81

167-81

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 303.

G. G. LATTA, EXECUTOR OF THE ESTATE OF WILLIAM H. GAINES, DECEASED, ET AL., APPELLANTS,

vs.

VINA GRANGER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JULY 22, 1895.

(15,954.)

(15,954.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 303.

G. G. LATTA, EXECUTOR OF THE ESTATE OF WILLIAM H. GAINES, DECEASED, ET AL., APPELLANTS,

vs.

VINA GRANGER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript	1	1
Transcript from United States circuit court, eastern district of Arkansas	2	1
Caption to transcript	2	1
Bill of complaint	2	1
Exhibit—Deed of lease, W. H. Gaines to Perry Huff, June 26, 1875	5	4
Answer, demurrer, and cross-bill of Vina Granger	6	5
Order: leave to amend complaint by interlineation	11	10
Replication to defendant's answer	11	10
Order dismissing cause as to defendant, Perry Huff	12	11
Decree and order of reference to special master	12	11
Report of special master	13	12
Testimony before the master	14	13
Testimony for complainants	14	13
Testimony of Albert B. Gaines	14	13
John D. Ware	15	13
O. F. Smith	15	14
Decree on master's report	16	14

Judd & Detweiler, Printers, Washington, D. C., November 9, 1896.

	Original.	Print.
Mandate of Supreme Court	17	15
Decree on mandate of Supreme Court	19	16
Entry of filing of report of W. S. McCain, etc	20	18
Report of master	20	18
Testimony for complainants	20	18
Testimony of Ed. Hogoboom	20	18
A. B. Gaines	27	24
J. B. Mellard	29	25
George W. Baxter	30	27
John J. Ware	33	29
Alf. Whittington	37	33
Testimony for defendant	43	38
Testimony of D. C. Rugg	43	38
Lucien Farmer	46	41
Master's statement of account	48	42
Complainants' exceptions to master's report	48	43
Final decree	49	43
Entry of filing of petition for appeal, etc	50	44
Petition for appeal and assignment of errors	50	44
Supersedeas bond	51	45
Clerk's certificate to transcript	51	45
Amendment to transcript of record	52	46
Stipulation as to amendment to record	52	46
Deposition of Vina Granger	52	46
Petition for and order enlarging time to file record	54	47
Appearance of counsel for appellants	55	48
Appearance of counsel for appellee	56	49
Petition and stipulation to revive cause	56	49
Order reviving cause	57	49
Stipulation as to printing and decree	58	50
Order of submission	59	51
Opinion	61	52
Decree	64	55
Petition for order fixing amount of supersedeas bond	64	55
Order fixing amount of supersedeas bond	65	56
Petition for appeal and assignment of errors	66	57
Supersedeas bond	67	57
Order allowing appeal	68	58
Citation and acknowledgment of service	70	59
Clerk's certificate to transcript	71	60
Stipulation to print record herein, and that Nos. 304, 326, 327, 328, and 329 abide decision of this case	72	60

1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at a term thereof begun and held at the city of St. Paul, Minnesota, on the first Monday in May, it being the sixth day of May, A. D. 1895, before the Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fifth day of April, A. D. 1894, a transcript of record, in pursuance of an appeal allowed by the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in a certain cause wherein William H. Gaines *et al.* were appellants and Vina Granger was appellee; which said transcript of record is in the words and figures following, to wit:

2 Be it remembered that on the 23d day of May, 1894, came into the office of the clerk of the circuit court of the United States for the eastern district of Kansas, William H. Gaines and wife, by M. W. Benjamin and R. G. Davis, Esqrs., their solicitors, and filed therein, on the chancery side of said court, their bill of complaint against Perry Huff, Eva M. James, & Vina Granger, which is in words and figures as follows, to wit:

United States Circuit Court, Eastern District of Kansas, October Term Thereof, 1894.

William H. Gaines and Maria Gaines, His Wife, Plaintiffs,
vs.
Perry Huff, Eva M. James, & Vina Granger, Defendants.

William H. Gaines and Maria Gaines, his wife, bring this suit against Perry Huff, Eva M. James & Vina Granger, and for cause of action allege that in the year of 1851, in pursuance of the instruction of the Secretary of the Interior, plaintiff Maria Gaines, Albert Belding, Henry Belding and George Belding, heirs and legal representatives of Ludovicus Belding, entered, under the preemption laws of the United States, the southwest quarter of section thirty-three, in township two (2) south, range nineteen (19) west, for which they paid the United States Government two hundred dollars, which was advanced and paid by plaintiff Wm. H. Gaines, and which money the United States still retains. At the time of said entry a small portion of said land was occupied by Mrs. Lydia Belding, widow of Ludovicus Belding, and the portion of said lands for which this suit is brought was occupied by —— —— and in — William H. Gaines, Maria Gaines, Albert Belding, Henry Belding and George Belding, under the supervision and control of Wm. H.

Gaines, brought suit in the Hot Springs circuit court against —— —— and recovered judgment for the possession of said land, which judgment was afterwards affirmed by the supreme court of the State of Arkansas and by the Supreme Court of the United States, and on the — day of ——, 1856, Wm. H. Gaines was, by the sheriff of Hot Springs county, put into possession of said property by virtue of a writ of possession issued upon the judgment of said
3 Hot Springs circuit court in obedience to the mandates of said supreme courts, both of the State and of the United States, and said plaintiffs, William H. Gaines and Maria Gaines, his wife, remained in peaceable and quiet possession of said property until the first day of June, 1876, when they were dispossessed of said property by a receiver appointed by the Court of Claims of the United States under an act of Congress entitled "An act in relation to the Hot Springs reservation, in Arkansas," approved June 11th, 1870.

Plaintiffs entered into possession by virtue of said entry and by virtue of the decisions of said State and United States Supreme Courts and the writs of possession issued in pursuance of said judgments, and continued in possession for a period of about twenty years, until the Supreme Court of the United States, in a suit to determine to whom the patent should issue, decided that said lands were not subject to pre-emption or entry, and that no claimant was entitled to a patent, but the same was still the property of the United States, which decision was rendered April 24th, 1876. Plaintiffs during said twenty years paid taxes on said property, and fenced and built houses on the same, and otherwise improved the same.

On the 26th day of June, 1875, plaintiff, William H. Gaines, being fully authorized by the said heirs leased a lot of ground, which has since been laid off into lots and blocks by the Hot Springs commission in pursuance of an act of Congress, and is now known as lot sixteen (16) in block sixty-eight (68) to Perry Huff, which lease was for the term of one year, to be renewed at the election of the lessee from year to year until the title of the Hot Springs quarter section of land was settled for an annual rent of one hundred and sixty dollars, payable in monthly installments of —.

Said lease also provided that all buildings and improvements erected on said lot by the lessee might be removed therefrom during the continuance of the lease, or within thirty days thereafter, but that no buildings or improvements erected could be removed while said rent or any part there*fore* remained due and unpaid. It is also provided that the lessor should have a lien on all buildings and improvements to secure the rent; a copy of which is hereto attached in Exhibit "A" and made a part hereof. Said lessee took possession of said land under and by virtue of said lease only, and in no other way whatever, and he and assigns occupied the same under said lease until the 1st day of June, 1876, at which time the United States Government dispossessed all parties to this suit then in pos-

session, and took possession thereof, and leased said lands
3½ and improvements in the name of the United States Government, through a receiver appointed by the Court of Claims for that purpose, and continued in legal possession thereof until the same was entered in U. S. land office, to wit, 1881; that on the 24th day of April, 1876, said lessee and *their* assigns owed the lessor for rent the sum of eighty-four dollars and sixty-two cents ($84.62).

Said lessee and *their* assigns failed to remove said buildings and improvements erected by *them* at any time during or within thirty days after the expiration of the lease, and by virtue of the provisions of the lease said buildings and improvements erected by said lessee and *their* assigns became the buildings and improvements of William H. Gaines.

That on the 17th day of March, 1880, said lessee, Perry Huff, sold and transferred to Eva M. James and Vina Granger all his right, title and claim to said premises, *she* Eva James and Vina Granger well knowing before said transfer all the terms and conditions of said lease, which transfer was made without the knowledge or consent of the plaintiffs—

Said Eva James and Vina Granger before said purchase well knowing that Perry Huff acquired his possession solely by virtue of said lease and that all claim that he had to purchase said property was by virtue of said lease, and well knowing the plaintiffs' right and equity to said premises.

Plaintiffs, by arrangement with George, Henry and Albert Belding, having become the owners of said claim, to wit, by a deed from Albert, Henry and George Belding to Wm. H. Gaines for one undivided half of three-fourths of the entire pre-emption claim aforesaid, dated June 1st, 1860, a copy of which is hereto attached, and made a part hereof, marked Exhibit "B;" also a deed dated Oct. 20, 1877, from Albert Belding to William H. Gaines for his entire interest, a copy of which deed is hereto attached and made a part hereof, marked Exhibit "C;" also deeds to Wm. H. Gaines from both George and Henry Belding for the entire interest of each, copies of which deeds are in Exhibit "A" hereto—aver that in less than six calendar months after the first sitting of the Hot Springs commission, under the act of Congress of the United States entitled "An act in relation to the Hot Springs reservation, in the State of Arkansas" approved March 3d, 1877, they filed their claim before said commission to purchase said lots, and that Perry Huff filed a like claim, and that upon the hearing of said claims they were consolidated by said commission for the purpose of hearing the testimony; and said petitions filed and the testimony taken before said
commission clearly showed that Perry Huff had acquired his
4 possession in no other way but by said lease made by plaintiff Wm. H. Gaines to said Perry Huff, as will more fully appear from a complete copy of the petition, testimony and record entries in said claims filed herewith and marked Exhibit "A" and made a part hereof; and, notwithstanding that said petition and testimony showed that defendant Perry Huff acquired possession

only by virtue of said lease, still said commission misconstrued the law applicable to that state of facts and awarded the right to purchase said lots to defendant, Perry Huff, and since said award said defendant has purchased said lots from the United States and received a patent therefor, and on account of said misconstruction of the law as applied to the facts before said commission the right to purchase said lots, which in law, equity and good conscience should have been awarded to plaintiffs, was by said misconstruction of the law illegally and wrongfully awarded to defendant, Perry Huff, by said Hot Springs commission.

Plaintiffs aver that as defendants have never had any other right or title to said lots or to the possession thereof than that which they derived from said lease and under covenants to restore possession to plaintiff, Wm. H. Gaines, that said defendants should be held to hold said lots as trustees for the use and benefit of plaintiffs.

Plaintiffs offer to pay any sum of money that may be found due the defendants or either of them by reason of any money paid to the United States for the purchase of said lots, and to do all other acts which may be found just and equitable. Plaintiffs aver the property herein sued for is worth more than five hundred dollars, and that this cause of action arises wholly under the law of the United States.

Plaintiffs ask that defendants be required to answer, but not under oath.

And they pray that an account may be taken of the state of accounts between themselves or either of them and said defendants severally; that they may be allowed reasonable rents for the occupancy of the said premises; that defendants may be decreed to hold said lots as trustees for the plaintiffs, and to convey the same to the plaintiffs, and that they may have such other relief as may be equitable.

W. M. BENJAMIN.
R. G. DAVIES, *Sol's.*

Good for costs.
M. W. BENJAMIN.

Filed and writ issued May 23, 1884.
RALPH L. GOODRICH, *Clerk*,
By W. P. FIELD, *D. C.*

5 This agreement of lease, made this 26th day of June, 1875, between Wm. H. Gaines, as lessor, and Perry Huff, as lessee, witnesseth:

That the lessor, Gaines, has leased and devised to the lessee, Huff, a certain lot or parcel of land lying and being situated in the town of Hot Springs, in the county of Garland, in the State of Arkansas, and described and bounded as follows, to wit: Beginning at the north side of Clyde and Ingram's store, on the east side of Main street, near the south end of Hot Springs valley, run- thence along the street sixteen feet; thence east parallel with the north line of Clyde & Ingram's lot seventy (more or less) feet to the street, running down the creek; thence south sixteen (16) feet to Clyde and Ingram's lot; thence west along Clyde and Ingram's north line seventy (more or less) feet to the place of beginning, embracing and comprising a lot of sixteen (16) ft. wide and running east and west from Main street to the creek road or street; to have and to hold the same unto the lessee, Huff, for one year from the first day of July, 1875, to the first day of July, 1876, to be renewed and extended from year to year, if the lessee shall so elect, until the title to the Hot Springs quarter section of land is settled, the lessee yielding and paying therefor as a rental in said lot the sum of one hundred and sixty dollars per annum, to be paid by the lessee, Huff, to the lessor, Gaines, in installments of thirteen and $\frac{33}{100}$ dollars each, monthly, in advance, on the first day of each and every month during the continuance hereof; and it is agreed that all buildings which the lessee may erect on said lot during the continuance hereof may be removed therefrom by the lessee at any time within thirty days from the expiration hereof, or within thirty days after the expiration of any time to which this term may be extended:

Provided, however, that the lessor shall have a lien on all such buildings to secure the payment of the rent hereinabove provided for; and it is further agreed that if the lessee shall at any time make default and shall at any time be in arrears with said rent or any part thereof for ten days at any one time the lessor may at his own election enter upon said lot or any part thereof and eject the lessee therefrom and repossess himself of the same without notice or legal process. This lease shall not be assigned nor the property underlet without the written consent of the lessor having been first indorsed hereon.

Witness the hands and seals of the parties hereto this 26th day of June, 1875.

WM. H. GAINES. [SEAL.]
PERRY HUFF. [SEAL.]

6 And on August 7, 1884, as follows:

Comes Vina Granger, by John M. Harrell, Esq., her solicitor, and by leave of the court, files herein her answer, cross-bill, and demurrer; which answer, cross-bill and demurrer are as follows:

Answer and Cross-bill.

United States Circuit Court, Eastern District of Arkansas.

WILLIAM H. GAINES and MARIA GAINES, His Wife, Plaintiffs,
ag'st
PERRY HUFF and VINA GRANGER, Defendants.

Vina Granger, widow, the above-named defendant, answering the complaint of William H. Gaines and Maria Gaines, plaintiffs, states:

I.

That said Perry Huff has no interest in the lots of land and property which are the subject of this controversy; that said Perry Huff, prior to the 24th day of April, 1876, was the owner and occupant of the improvements on said lot sixteen and part of lot seventeen, sued for in this action, and within less than six (calender) months after the first sitting of the Hot Springs commission, appointed and organized under the act of Congress entitled "An act for the disposition of the reservation of the Hot Springs and for other purposes," approved March 3d, 1877, and within twelve months after the approval of said act, filed his claim before said commission for the right to purchase said lots under the provisions of said act, and upon the testimony and other evidence offered in support of said claim, the said Perry Huff was duly awarded the right to purchase said lots by the said commission; that on the — day of ——, 18–, by deed in writing, that said Perry Huff conveyed all his right and title to said lot and improvements to this defendant for the consideration paid to him by her of two thousand five hundred dollars and immediately delivered possession of the premises to this defendant, a copy of which deed is appended hereto and prayed to be made a part hereof; that this defendant then entered into said premises and has held the same under said deed from thence hitherto.

II.

Defendant further states that said lot of land upon which said improvements were so erected was at the time of the erection of said improvements vacant and unoccupied land of the United
7 States, by the act of Congress of April 20th, 1832, reserved
for the future disposal of the United States, not to be entered, located or appropriated for any other purpose whatever, and no action by Congress for the disposal of said land had been taken at the time when said improvements were so erected thereon, and no valid entry of said land with the register and receiver of the land office of the United States had been made or pre-emption right acquired thereto by any person or persons.

III.

This defendant further states that she paid the sum required to be paid as the price of the purchase of said lots to the United States receiver, and that a patent certificate of the United States conveying title to said Perry Huff was issued to said Perry Huff, the title conveyed thereby inuring under the laws of this State to defendant as vendee under said first-mentioned deed of said Perry Huff, and said patent by the said Perry Huff deposited with this defendant as her muniment of title to the said lots, a copy of which patent certificate is appended hereto and prayed to be made a part hereof.

IV.

This defendant states that it is not true, as in said complaint alleged, that in 1851, or at any other time, the heirs of Ludovicus

Belding entered said land, because the same was not subject to entry or sale after said act of reservation of April 20th, 1832. It is true that on the 29th day of May, 1830, said Ludovicus Belding occupied a small part—the S. W. quarter of section 33, in township 2, south, range 19, west, on said land so reserved, known as the United States reservation of the Hot Springs, in the State of Arkansas, at another part of said quarter section than that included in the lots in controversy, as a tenant of one John Percifull, under a written lease, and said Belding, in 1831, at the end of said lease, surrendered possession of all said part of said quarter section so occupied by him to said Percifull, and under said lease had also occupied and cultivated said part of said quarter section in 1829, and under instructions of the Secretary of the Interior, the heirs of said Belding, November 21, 1851, were permitted to pay the entrance money for said land, and the register and receiver of the land district in which said land was situated, instructed to issue a certificate of entry therefor, and to note therein and in the books and return to the General Land Office the fact that such entry was an interference with the New Madrid location of Francis Langlois, No. 467, and of its embracing land directed to be reserved by act of 20th April,
1832, and that it was permitted under the decision of the
8 Secretary of the Interior; that said entry was absolutely void
and in violation of law, and, coming regularly before the
Secretary of the Interior for his consideration, afterwards, on the — day of ——, 18–, was by him vacated and held for naught, and said entry has thenceforth been held void by the supreme court of Arkansas, and by the Supreme Court of the United States, and by every department—executive, legislative and judicial—of the Federal Government.

V.

This defendant denies that plaintiffs ever obtained or had possession of the lots or improvements thereon in controversy in this suit and avers that the same was vacant and unoccupied land of the United States when said improvements were erected by said Perry Huff, which improvements were erected prior to April 4th, 1876, and sold and delivered with said lots of land to this defendant by said Perry Huff under the conveyance in writing as aforesaid.

VI.

This defendant further states that, under the provisions of an act of Congress, entitled "An act in relation to the Hot Springs reservation of the State of Arkansas," which was passed on the 31st day of May, 1870, and became a law as provided by the Constitution, the plaintiffs instituted their suit against the United States in the United States Court of Claims, in which cause such proceedings were had that on the 25th day of April, 1875, a decree was rendered against plaintiffs and said entry and their title and claim thereunder declared void, from which decree plaintiffs appealed to the Supreme Court of the United States, in which Supreme Court such proceedings were had that afterwards,

to wit, on the 24th day of April, 1876, the said decree of said Court of Claims was affirmed, and under the provisions of said last-mentioned act, the said Court of Claims in said cause appointed Albert O. Morgan, receiver, to take charge of and rent out all the said Hot Springs property—the land and improvements included in said reservation—and that said Albert O. Morgan qualified and entered upon the duties of such receiver, and in accordance with said decree ousted the plaintiffs of all their possessions in said reservation, as plaintiffs state in their complaint, and practically ousted this defendant of her possession of the premises by demanding of defendant rent to the United States for said premises, and executed a written lease to this defendant, and leased said premises to defendant for one year from the — day of ——, 1876, under which lease
this defendant retained possession of said property and paid
9 rent to said receiver until the passage of the act of March 3rd,
1877, a copy of which receiver's lease and receipts are appended hereto and made a part hereof, said defendant thereby attorning to said United States as her landlord and sole owner, having paramount title to the premises.

VII.

Said defendant denies that said improvements or any part thereof belong to plaintiffs or the heirs of Belding, or that plaintiffs ever contributed any money or material in the erection of the same.

VIII.

The defendant states that it is not true that plaintiffs filed their claim to the lots in controversy within six (calender) months after the first sitting of the Hot Springs commission under the provisions of the said act of March 3rd, 1877, or within twelve months after the date of approval of said act, but that, on the contrary, they filed an omnibus claim, conveying a great part of the city of Hot Springs, by far the greater part of which had been held adversely to the plaintiffs for many years, some of it for more than fifty years, or ever since said John Purcifull took possession of said tract and held the same as aforesaid as lessor of the said Ludovicus Belding.

And defendant prays leave to exhibit so much of said proceedings in said Court of Claims of the United States as may be necessary to show that plaintiffs were parties thereto, the subject-matter thereof, and the final decree of ouster therein by the appointment of said receiver.

IX.

Defendant sets up the said decree of the United States Court of Claims as a complete bar to all the pretenses of claim of the plaintiffs in this cause.

X.

Defendant, further answering, states that the award of said commissioners to said Perry Huff was made Dec. 2nd, 1879, and that plaintiffs acquiesced in said award by declaring their satisfaction in regard to the same and by dealing in recognition of the finality and justice and equity of the same until they instituted suits in this and other causes to renew the awards and adjudications of said commissioners in such cases and are estopped by their said acquiescence to sue herein.

10 XI.

And defendant states that she purchased the said lots and claim of said Perry Huff in view of said act of Congress of March 3rd, 1877, and said award by said commission to him thereunder and relying upon said notorious acquiescence of said plaintiffs, and accepted said conveyance of the same by said Perry Huff under the patent certificate of the United States to him of said lots in good faith, and pleads her said purchase in good faith, in bar of plaintiffs' suit herein.

Demurrer.

And, having fully answered, this defendant demurs to said complaint of the plaintiffs and prays to have the benefit of her said demurrer on the final hearing, and for cause assigns the following:

I.

There is no equity upon the face of plaintiffs' complaint.

II.

The same discloses the final adjudication of the matters in controversy by a competent tribunal, to wit, the board of commissioners appointed and organized under the act of Congress approved March 3rd, 1877, to lay off and dispose of the United States reservation of the Hot Springs.

III.

The pretended lease is parol and void by the statute of frauds beyond a period of one year, and, if made, expired in 1876, before the passage of said act of Congress of March 3rd, 1877, and was a lease to Gaines individually.

IV.

Said complaint fails to disclose that plaintiffs owned any improvements upon or occupied said lot or any part thereof *pedii possessio* on the 3rd day of March, 1877.

V.

Said complaint is otherwise defective, informal, and insufficient.

Cross-bill.

And, by way of cross-bill, said defendant, Vina Granger, states that she is the owner of valuable improvements placed upon said lot, which are of the value of five thousand dollars ($5,000), and

11 was such owner at the date of the entry of said lot, under the award to said Perry Huff as aforesaid, by payment of the price of said lots required by the acts of Congress upon the appraisement of the same by said commission, and has paid all taxes, assessments, and impositions made on said lots—State, city, and county taxes—since the date of said purchase.

And should it turn out in proof that plaintiffs are entitled to recover and the court be of opinion that said entry was for the benefit of plaintiffs, then it was an entry of the improvements of this defendant upon the land of the United States, and this defendant will be entitled to the full value of said improvements from said plaintiffs.

Wherefore, she prays that in such event she may be excused from the payment of all rents, as provided by section 2260 of Gantt's Digest of the Statutes of Arkansas, and that she be allowed and decreed against the plaintiffs the full value of all her said improvements and all the taxes, assessments, and impositions so paid by her on the same, and be discharged hereof with all her costs in this suit expended.

VINA GRANGER,
By JOHN M. HARRELL,
Her Solicitor.

Filed August 7, 1884.

RALPH L GOODRICH, *Clerk*,
By W. P. FEILD, *D. C.*

On December 1, 1884, the plaintiffs, by M. W. Benjamin, Esq., their solicitor, ask leave to amend their complaint by interlineation, which is granted; and thereupon, said amendments are made.

And on January 5, 1885, as follows:

Come the complainants, by M. W. Benjamin and R. G. Davies, Esqrs., their solicitors, and file herein their replication to defendants' answer; which replication is as follows:

United States Circuit Court, Eastern District of Arkansas, October Term, 1884.

GAINES & WIFE
vs.
HUFF *et al.*

The said plaintiffs say their bill is true, and that the answer of the defendants is not true; and this they are ready to verify.

M. W. BENJAMIN,
R. G. DAVIS, *Sol's.*

Filed Jan. 5, 1885.

RALPH L. GOODRICH, *Clerk.*

12 Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas,

begun and holden on Monday, the 25th day of October, anno Domini, one thousand eight hundred and eighty-six, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable David J. Brewer, circuit judge, presiding and holding said court, the following proceedings were had, to wit:

On March 2, 1887, as follows:

Come the complainants, by M. W. Benjamin, their solicitor, and on his motion it is ordered that this cause be dismissed as to the defendant, Perry Huff.

And on the same day as follows:

Now, this day, this case coming on for final hearing upon complaint of plaintiff, the separate answer of defendant, Vina Granger, and replication to answer and the evidence, and the court having heard the argument of counsel and being sufficiently advised as to what decree to render herein, the court finds that the board of commissioners mentioned in said complaint, by error and mistake of law, awarded the right to purchase lot sixteen (16), block sixty-eight (68), of the Hot Springs reservation, in the city of Hot Springs, county of Garland, State of Arkansas, to Perry Huff, who sold said lot to defendant, Vina Granger, who had notice of plaintiffs' claim to said lot, and issued to him, said Huff, a certificate of award, and that, in accordance with said erroneous ruling, a patent issued to him, the said Perry Huff, improperly; and the court is of opinion that said defendant, Vina Granger, holds said patent and deed as trustee for the sole use of William H. Gaines and Maria Gaines, plaintiffs herein.

It is therefore considered, ordered and decreed that all right, title interest and estate of said defendant, Vina Granger, in and to said lot or tract of land be, and the same is hereby divested out of said defendant, Vina Granger, and vested in William H. and Maria Gaines, plaintiffs herein, and their assigns and heirs forever, and that said defendant, Vina Granger, do make, seal and deliver a deed conveying said lot to said plaintiffs, William H. and Maria Gaines, their heirs and assigns forever; and said defendant, Vina Granger, prays an appeal, which is by the court granted.

And it is further ordered that this case be referred to N. W. Cox, Esq., special master of this court, who is directed to ascertain and report to this court at its next term:

First. The value of the rents of said lot since the award of said commissioners.

13 Second. What amount of taxes has been paid on said lot by said defendant, Vina Granger, since the award by said commissioners.

Third. The value of the improvements made upon said lot before and since the award of said commissioners.

And the master may examine witnesses touching said matters, and shall reduce the same to writing, and shall also use any testimony on file in said cause at the hearing, and report the testimony so taken to the court; and it is further ordered that the plaintiffs do have and recover possession of said lot, and that they have and recover the costs of suit herein, but no writ of possession to issue until the confirmation of said master's report.

And it is further ordered that all questions of law touching the several matters herein referred to the master be, and the same are, reserved until the coming in of his report; and this cause is reserved for further direction.

And the court finds from the evidence that the lot in controversy is at this date of the value of five thousand and five hundred dollars.

And on April 9, 1887, as follows:

Comes N. W. Cox, Esq., master herein, and files his report, which report is as follows:

In the U. S. Circuit Court, Eastern District of Arkansas.

WM. H. GAINES & WIFE, Plaintiffs,
vs. } 655.
VINA GRANGER *et al.*, Defendants.

To the hon. U. S. circuit court, eastern district of Arkansas:

In accordance with the decree of this hon. court made March 2, 1887, in the above-entitled cause, as special master thereunder, I have made inquiry of the matters and things therein directed. After the examination of the witnesses produced by the parties hereto, and whose testimony I file herewith, I find:

First. That the rental value of said lot 16, block 68 without improvements, to be $10.00 per front foot per annum; that the frontage of said lot is 21.2 ft. by 90 ft. in depth, and the time to be 7 years and 4 mos. from the date of the award to the 1st day of the April term, 1887, of this court, to which this report is made, amounting to ...	$1,554 66
Int. on same, 6 yrs. & 4 mo., at 6 per cent...	295 38
	$1,850 04
14 That the rental value of said lot with improvements is $600 per annum for 7 yrs. & 4 mo...	4,400 00
Second. That the taxes paid by defendant, Vina Granger, including sidewalk and sewer assessment...	370 65
Discount on ac. scrips on $260.65...	33 88
	$336 77
Int. $285.65 (5 yrs.), taxes at 6 per cent...	42 35
Amounting to...	$379 62

The defendant failed to show how much she paid the Government for said lot.

Third. That the value of the improvements made upon said lot before the award was	$1,200 00
Since the award	2,195 00
Total	$3,395 00

That the present value of said improvements is $1,800.00.

Respectfully submitted.

N. W. COX.
Special Master.

Depositions of witnesses, taken before N. W. Cox, master, appointed by U. S. circuit court for the eastern district of Arkansas, at the city of Hot Springs, on March 17th, 1887, in the case of William H. and Maria Gaines against Perry Huff and Vina Granger, pending in said court.

Present: Plaintiffs, by R. G. Davies, Esq,, att'y, and defendants, by John M. Harrell, Esq., att'y.

Albert B. Gaines, being introduced upon the part of the plaintiffs, and first duly sworn, deposes and says:

Ques. 1. State your name, age, residence.

Ans. My name is A. B. Gaines; residence, Hot Springs; age, 29 years.

Ques. 2. Are you familiar with the rental value of property in the neighborhood of lot 16, in block 68, in the city of Hot Springs, since the award of the Hot Springs commission?

Ans. I am. I have been renting property in that vicinity since 1877.

Ques. 3. What is a reasonable rental value of that lot during that time, with the improvements and without the improvements, said lot being 21.2 feet in width and 90 feet in depth?

15 Ans. With improvements, $100 per month; without improvements it is worth $15 per year per front foot.

ALBERT B. GAINES.

John D. Ware, being introduced upon the part of the plaintiffs, and first duly sworn, deposes and says:

Ques. 1. State your name, age, residence and occupation.

Ans. My name is John D. Ware; age, thirty-five years; residence, Hot Springs; occupation, real-estate and insurance agent.

Ques. 2. Are you familiar with the rental values of property on Central avenue since the award of the Hot Springs commission?

Ans. I am to some extent. I have had some rents to collect, and it has otherwise come under my observation.

Ques. 3. Have you a general knowledge of what a lot situated as lot 16 in block 68, city of Hot Springs, 21.2 feet front by 75 feet in depth, with a house upon it — feet wide by — feet in depth, two stories and basement, would rent for during said time—that is to say, the market value; and if so, what would it be?

Ans. The rental value of lot 16 in block 68 is now worth $50 per month with improvements.

Ques. 4. Can you state what would be a rental value per front foot for the ground of a lot 21.2 feet by 75 feet deep, during that time, in that locality, as a ground rent, without any improvements upon it?

Ans. I think it would be worth ten per cent. upon whatever the land and improvements would bring. By taking off the improvements and calculating the ten per cent. upon the value of the land would be its rental value. I estimate that ground to be worth at present $200 per front foot; then, say, $15 per front foot.

Ques. 6. Have you sold any property or had any offers to buy property in that immediate neighborhood; and, if so, at what price?

Ans. We sold lot 6 in block 77 for $6,000. We have had offers for lot 21, in said block, at $200 in cash per front foot, and we made the offer to the owner, and he refused it.

JOHN D. WARE.

O. F. SMITH, being introduced upon the part of the plaintiffs and being duly sworn, deposes and says:

Ques. 1. State your name, age, residence and occupation.

Ans. My name is O. F. Smith; age, 49 years; residence, Hot Springs, Ark.; occupation, real-estate and loan agent.

16 Ques. 2. How long have you been in the real-estate business and in Hot Springs?

Ans. I went into it four years ago last June.

Ques. 3. Are you familiar with the rental values of property on Central avenue, in the city of Hot Springs, during that time, in the vicinity of lot 16 in block 68?

Ans. I took charge of some buildings in block 77 on the opposite side of the street, after I went into business. I think about three years ago.

Ques. 4. Have you a general knowledge of what a lot situated as lot 16 in block 68, with a house upon it — feet wide and — feet deep, two stories high, would rent for during that time—that is to say the market value; and, if so, what would it be?

Ans. My judgment is that said lot with such a building would rent at $300 per annum. I place it at $300 to be safe, as it might be vacant some and it might rent for more.

Ques. 5. Can you state what would be a reasonable rental value per front foot for the ground for said lot 16, block 68, for said time, as a ground rent, without any improvements upon it?

Ans. I should say about $5 per annum per front foot.

O. F. SMITH.

On November 10, 1887:

Now, on this day, come the said plaintiffs, by their solicitors, M. W. Benjamin and R. G. Davies, and also come the said defendants, Vina Granger and Perry Huff, by John M. Harrell, Esq., *his* solicitor, and the special master having heretofore filed his report herein, and this case coming on for hearing, and the court having heard the argument of counsel and being now sufficiently advised as to the further decree to render herein:

It is ordered, adjudged and decreed that all the exceptions of the defendants to the master's report be, and the same are overruled; to which judgment overruling said exceptions defendants then except; and thereupon the court finds and states the account between the plaintiffs and defendants as follows:

To amount due said plaintiffs for rent, according to the terms of the lease, from the date of award to the date of filing of the bill in this case and interest, eight hundred and fourteen dollars and twelve cents; to amount due them since said date and until the filing of the master's report, the rental value of the property, and interest annually, six hundred and seventy dollars and thirty-eight cents; amount of rent to date of this decree, three hundred and fifty dollars; amounting in the aggregate to the sum of
17 eighteen hundred and thirty-four dollars and fifty cents. By amount due defendant for taxes paid and interest, three hundred and seventy-nine dollars and sixty-two cents; by amount of purchase-money paid by her to Government for said lot and interest, two hundred and ten dollars and forty cents; by present value of the improvements, eighteen hundred dollars; which said sums amount in the aggregate to two thousand three hundred and eighty-nine dollars and sixty-two cents; from which take eighteen hundred and thirty-four dollars and fifty-nine cents, as above, leaves the sum of five hundred and fifty-five dollars and twelve cents, which the court finds to be the balance now due the defendant.

It is therefore ordered, adjudged and decreed that the said defendant do have and recover from said plaintiffs said amount—five hundred and fifty-five dollars and twelve cents—and all costs of this suit, and that she have execution therefore.

And it is further ordered and decreed that the said plaintiffs do have and recover from said defendants the possession of said lot sixteen in block sixty-eight, of the Hot Springs reservation, and that a writ of possession issue, and serving a copy of this decree shall be the writ.

It is further ordered that N. W. Cox be allowed the sum of one hundred dollars for his services as master herein.

And the defendants prays an appeal to the Supreme Court, which is granted, and it is ordered upon their executing and filing a bond within the time and conditions as prescribed by law, in the sum of three thousand dollars, and cost bond for two hundred and fifty dollars, with good, approved security, the decree be superseded pending said appeal.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, Greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Arkansas before you, or some of you, in a cause between William H. Gaines and Maria Gaines, his wife, complainants, and Vina Granger, defendants, wherein the decree of the said circuit court, entered in said cause on the 21st day of April, A. D. 1888, is in the following words, viz:

(See copy of final decree in court below, from which the appeal was taken, *ante*, pages 26 and 27.)

18 as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by George G. Latta, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, at the present term of October, A. D. 1891, of said Supreme Court, the death of Maria Gaines, one of the appellees in this cause, having been suggested, it was ordered that Albert R. Gaines, executor, and William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdale, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert R. Gaines, sole devisees and legatees of the said Maria Gaines, deceased, be made parties appellees herein.

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed, each party to pay one-half of the costs in this court.

And it is further ordered that this cause be, and the same is hereby remanded to the said circuit court for further proceedings to be had therein in conformity with the opinion of this court.

May 2, 1892.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

[SEAL.] JAMES McKENNEY,
Clerk of the Supreme Court of the United States.

1st.

UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas. }

Be it remembered, that at a circuit court of the United
19 States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday,

the twenty-fourth day of October, anno Domini one thousand eight hundred and ninety-two at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, circuit judge (*judge*) presiding and holding said court, the following proceedings were had, to wit, on April 3, 1893:

William H. Gaines, Albert Gaines, as Executor of the Last Will and Testament of Maria Gaines, Deceased; William H. Gaines, Jr.; Fannie C. Williamson, Louisa G. Blaskell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines, and Albert B. Gaines,
vs.
Vina Granger.
} 655.

Now on this day came said plaintiffs by U. M. & G. B. Rose, Esqs., their solicitors, and also came said defendant by John McClure, Esq., her solicitor, and said plaintiffs by leave of court having filed here the mandate of the Supreme Court of the United States in this cause; wherefore it is now on their motion ordered, considered and decreed by the court that all the right, title, claim and interest of said defendant in and to lot sixteen in block sixty-eight in the city of Hot Springs be, and the same is divested out of her, and that the same be vested in said plaintiffs, and that the account between said plaintiffs and said defendant be stated in accordance with the directions contained in said mandate, and that in taking said account said defendant be charged with the rental value of said lot from the 23rd day of May, 1884, or during such portion of said time as they may have kept said plaintiffs out of the possession thereof down to this date, with interest on the same from the end of each year at the rate of six per centum per annum, no additional rent to be charged to said defendant by reason of any improvements placed on said lot by said defendant, and that said plaintiff be charged with all taxes paid by said defendant on said lot since the 23rd day of May, 1884, with interest on the same from the time of such payments until this date at the rate of six per centum per annum, also with the present value of the improvements placed by said defendant on said lot as the same may appear at this date; also the sum of — paid by said defendant to the United States for said lot, with interest on the same at the rate of six per centum per annum from the date of payment until this date, and that said defendant pay all the costs by plaintiff paid out and expended in this cause in this court and that *they* have execution therefor as at law.

And W. S. McCain, special master herein, is now directed to
20 proceed to state an account between said parties according to the terms of this decree, and to that end he shall take testimony in writing of all witnesses produced, and shall report the same with all his proceedings and findings herein to this court.

2nd.

UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, that at a circuit court of the United States of America, in and for the western division of the eastern district of Arkansas, begun and holden on Monday, the tenth day of April, anno Domini one thousand eight hundred and ninety-three at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, district judge presiding and holding said court, the following proceedings were had, to wit, on May 5th, 1893:

W. H. GAINES *et al.*
vs. 645.
VINA GRANGER.

Comes W. S. McCain the master herein and files his report, and come the plaintiffs by U. M. & G. B. Rose, Esqs., their solicitors, and file exceptions to said report.

Which master's report is as follows:

Master's Report.

Testimony relating to rental value of blocks 63, 77, 129, 130, &c.; to be considered in all of the Gaines suits.

FRIDAY MORNING, *Apr. 14th.*

ED. HOGOBOOM, testified as follows, on behalf of plaintiffs (this testimony relates to all of the Gaines cases):

Q. State your name, age, residence and occupation.

A. Age 50, residence, Hot Springs, occupation, banker, resided here 16 or 17 years.

Q. Have you been an owner of property and are you familiar with the rental values of property in the business portion of the town since May 23rd, 1884?

A. I know of some things in that direction. I cannot say that I am particularly familiar.

Q. Have you been an owner of property in the business center?

A. Yes.

Q. What would be a reasonable rental value of lots ten and 7 in
block 130 from the 23rd of May, 1884, up to the present time, no
additional rent to be charged or considered by you by reason
21 of any improvements existing or placed on said lots during
that time? Lot 10 has a frontage on Central avenue of about
24 feet and on Valley street 24 feet. Lot 7 has a frontage on each
street of 52 feet.

A. The question of rental values would depend to some extent upon the term you could occupy the property. If you should lease a lot you could not occupy it for anything but a tent, of course you could not pay very much rent. It is an awful hard question to answer intelligently. Provided that during the time from May, 1884, to this date if there was a constant uncertainty and no certain tenure the value of the rental there would be a great deal less than if you could give a man a tenure of ten years. If you could lease it for 20 years with certain privileges—payment of improvements at the end of the term, &c.—probably it ought to rent for six per cent. of the value of the ground. But when you come to put a valuation on it is very difficult. I have a piece of ground vacant in that vicinity that has been vacant for three years or more. I have been unable so far to utilize it under a lease—any portion of it. I have a long lease—17 years to run yet, I pay rent on it, &c.

Q. In answer to the foregoing question please frame your answers if you can so you can state the rental value per foot per annum during the time I have stated.

A. I am to answer that question without any reference to my knowledge of anything that might be on the property or any of the uses that it might be put to. I assume that the land was vacant at that time and its rental put on that basis?

Q. Assume that it is vacant property and you are asked to give your opinion as to its value to rent as vacant property without any buildings on it?

A. All I could state is that the rental value of the property would be a nominal thing. That is, I am basing it on the fact that there is no tenure.

By the Master:

Q. Do you think it is essential then in trying to rent out this property that there shall be some fixed time that the lessee is to occupy it?

A. Yes.

Q. And that as to its rental value that value is determined largely or exclusively by the length of time the lessee is to keep it?

A. Yes. The Park hotel has been using a portion of my ground that they have been using it for two or three years for a pumping station without any rent at all, simply that they are subject to my
order to leave at any time. Two or three days ago I gave
22 Mr. Bancroft privilege to place his pump there with the
same understanding that he was to move it whenever I asked
him.

Q. What would you say then the owner could have gotten for this property if it had been without buildings if he had offered it for a term of one year and at the end of that year he offered it for another year? What would he have realized for it since May 23rd, 1884, per annum on a yearly renting?

A. I should expect to base that question upon the supposition that at the end of the year it was vacant and leased to a new person, basing that on the supposition that the lot is vacant at the end of each year and to be leased to some one else for one year I should say that these two lots—the rent on them ten dollars per month would be about as much as you could get the way things have been going for that time.

Q. If you asked this: That on the 23d of May, 1884, it had been offered on a term of nine years without any agreement whatever as to the buildings, but allowing the tenant to have his own arrangement about buildings and take his own risk—what would the owner have been able to get on these terms—on a nine-year tenure—no provision for the payment of improvements?

A. There is another question that comes up. Would the fact that it is within the fire limits—would that affect the calculation?

Q. Yes; that is to be considered. The lessee must take his chances on that.

A. It is within the fire limits now and certain class of buildings must be put up.

(It is agreed by counsel that there *is* no improvements on this property except such as were made by the defendants.)

A. I base my figures on the first place—I conclude that the (*the*) buildings would cost so much put up on that piece of ground and there was so much roomage and the rental value of that building would be so much. I take the loss of that building at the expiration of the lease of nine years and divide that up. Then I take the interest at six per cent. on the cost of that building from year to year. These two items I take out of the probable income of the property and the balance I would call a fair rental value.

Q. After calculating in this way what are you prepared to say would have been a fair rent for this property that could have been realized on a term of nine years by the owner without any obligation on his part to take the buildings?

A. The way that figures out upon that basis for a whole term—about three dollars per foot.

Q. That per annum would be about how much per foot?

A. For one year it would be about 33 and $\frac{1}{3}$ per cent. It
23 looks like a low estimate, but it is a thing that I am not familiar with in the way of experience. But the only way I can see is what the building would cost and the absolute loss on the building at the end of the time and the interest at six per cent. on the building. Take these two items from the amount of the gross rent, your taxes, insurance must come out. When you get through and lose the building that you must construct under the fire ordinance—a two-story building, I would figure rent at $4,500 per year.

Redirect.

By Mr. Greaves:

Q. What would be the rental value during this time if the tenant or the party in possession would be paid for his improvements at this time?

Objected to by defendants.

A. It would be worth about—it would make a difference of $200 per front foot. It is a wonderful difference. That is for the nine years.

By the Master:

Q. What would have been the rental value, the landlord agreeing to take the buildings and pay him? Give us per annum per foot.

A. I would say two dollars per foot per month. That would be $24 per year.

Q. What difference, if any, would there have been in leasing that property for nine years on these conditions in 1884 and now?

A. It was worth a good deal less then than now.

Q. Which way have you made your figures?

A. I was just figuring on values now. There was no street there. The property was in a different condition then. There were no improvements of any character then. The conditions have changed altogether.

Q. If it had been offered on a lease of nine years in May, 1884, on these terms, what difference would it make from these figures you have made?

A. About one dollar per front foot per month.

Redirect.

By Mr. Greaves:

Q. Have you rented any other property near this property since 1884? If so, state at what price and the terms of the lease.

A. I have a building on a lease of block 89. It is about
24 700 feet from this property. I have leased that property a number of years ago and cannot recollect how many. It was probably in 1886 or 1887 or 1888 or somewhere along there. I paid a dollar a front foot per month and have — pay for the improvements at the end of the lease. It is a ten-year lease. I pay the taxes. Then there is a certain part of the improvements that are to be paid for at the full cost without any regard to their value, such as excavating, &c. That is to be paid for at what it cost and the balance are to be paid for by their value. The lease is for ten years from the time it was made. I have another lease on the opposite side of Valley street. The lot next to the Great Northern hotel—between the hotel and the Arkansas Club that I pay 66⅔ cents per foot. It is on lots 8, 4 and in block 17. I have obtained a lease on that property for 20 years under the same terms as near as may be. I pay the taxes and I am to be repaid the value of the improvements at the end of the term. On that I pay $12 per year for 150 feet front. It runs 120 feet back. It runs to an alley back of that block.

Q. If your lease there was reduced from 20 to 5 years how much would that affect the price that you could afford to pay?

A. I could not rent it at all. I could not put any improvement on it under the fire ordinance and lose them at the end of the term—I don't know who to or what for. You see temporary improvements upon property here——

Q. With reference to lots in block 130—what would be a fair rental value from the 23rd day of May, 1884, up to the present time without reference to the fire limits you have spoken of, and no additional rent to be considered by you without reference to the fire ordinance you have mentioned, and no additional rent to be considered by you with reference to any improvement that (*that*) are now existing, or have been in existence, during the time, on that property? Say rent it for nine years?

Objected to by defendants.

A. It would be worth a good deal more. You could put a shanty on that and afford to pay about the same as I stated it was worth under the other conditions; that is, renting it back at that time. A man could temporarily have rented it for nine years without reference to the fire ordinance for one dollar per foot per month. A man could go in there and *and* put a $500 or $600 building up merely for a loss than to put up a good building. He could take more chances than to put up a good building.

Q. Considering the improvements that are on there now, but in your estimate not charging anything by reason of the im-
25 provements on there, what would have been the rental value of this property during the time mentioned?

A. That involves more figuring.

(Counsel for plaintiff- here reads to witness the language of the decree to govern him in answer to the questions.)

A. I would not change the figures I made before on a nine-year lease from the last question you asked before. I would not consider the difference between these buildings standing there and spending $1,000 or $1,200 to put another building on there for nine years. It would be one dollar per foot.

Q. Since May 23rd, 1884, to the present time what would have been a reasonable rent up to this time?

A. Strange as it may appear it is a hard thing to answer that question, taking into consideration the values at Hot Springs as they come. Property has been sold in that block for more than it is worth or more than it is reaping interest on. It is the hardest question to answer you could ask a man. I think $300 would be fair.

Q. When you figure the rental values what rate per cent. on the actual value do you compute?

A. Six per cent.

By Judge McClure:

Q. From May, 1884, down to the present time that property was being litigated. State your opinion from this standpoint. If a receiver had been appointed pending the litigation, which might terminate at any time, and the receiver was authorized by the court to rent this property from year to year, assuming the property to have been naked lots. What rental value could a receiver have obtained for either of the lots in block 130?

Objected to by plaintiffs.

A. I will answer that question that I think my figures were three dollars per front foot.

Q. For one year?

A. I would put that at 33⅓ cents per foot for one year. On the question of no certain tenure I state the rent would be nominal. I think the question you asked me will be explained in connection with this answer. I did not take that into consideration that it had been there nine years. My answer was based on the fact that they had the right to rent it for one year, it might be vacant for one year and then you might rent it for another year.

26 By the MASTER:

Q. Looking at that property from the present time back for a period of nine years could you say what has been the value of the ground to the man who has occupied it without regard to the building. Would that make any difference from the figures you have given, or could you figure it intelligently from that standpoint?

A. From my knowledge of what income a man has got from it?

Q. Yes.

A. I am not familiar with it. Some old shanties have rented for a nominal rent—some time vacant and some time occupied. I don't know what was realized.

Redirect examination:

Q. Owing to the fact that property is in litigation does it or not destroy the rental value, taking into consideration the parties who actually occupy it and the nature of the property?

A. Yes. It of course must affect the people who are occupying it and has done so and must have done so, because they could not put such improvements on it for a permanent tenure or probably would have done. Perhaps the business conducted in these buildings would be a fair indication of that.

Q. Taking that into consideration and discarding from your mind the value of the improvements, what has been the rental value of this property to the parties in possession during the time I have mentioned?

A. I could not tell that. I am not familiar with it. The property in litigation is all occupied, I think.

Q. Would the rental value of this property be greater or less on a nine-year lease from May 1884 or since? From that point?

A. It would be greater since. It has been increased up so recently. Probably there has not been any increase for the last three years. I don't know.

Q. To what extent has the town grown in that vicinity and have values increased since 1884?

A. They have grown in value in my estimation probably 33⅓ per cent., but it is a thing—there have been no transactions in that vicinity.

Q. Take a house that there is no dispute about. What increase has there been in the rental value?

A. I think there was an increase about the time the Eastman hotel opened, but it lapsed after that. There is a good deal of vacant room in some of the property. I have no property in the block.

Q. Does the testimony you have given apply substantially
27 to all this property fronting on Central avenue in blocks 77, 130, 129 and 68?

A. I could not make that apply to all of it. The property immediately below that in block 68, that property was in a pretty low state at that time. It has been improved a good deal since then, but it was property that I did not consider at all desirable. There is not enough difference—but there is a difference. There is not enough difference that I would not be able to change my testimony a great deal. I might make a difference if I had the time to figure. But I would not make much difference in the property in these four blocks, although there is a difference.

A. B. Gaines, for plaintiffs, testified:

Examined by Mr. Graves:

Age 30; have been a resident of Hot Springs up to two years ago; all my life; am a son of Wm. H. and Maria Gaines. My name appears as a party to these suits as executor of Maria Gaines, deceased.

Q. Have you been an owner of property in blocks 68, 77, 129 and 130 since May, 1884?

A. I own property in blocks 129 and 130.

Q. Do you know any other property in the business portion of the town?

A. Yes. I own some in block 86, right opposite 130.

Q. Are you familiar with the rental values of property in this vicinity since May 23, 1884?

A. I have a pretty good idea of it, I think.

Q. As to lots 10 and 7 in block 130, what would be a fair and reasonable value for lot ten occupied by Mr. J. J. Sumpter and lot seven occupied by Charlotte Cohn from the 23 of May, 1884, up to the present time, no additional rent to be considered by you as to the existing improvement on the lots during that time; just take the vacant lots?

A. I should consider from that time up vacant land would be worth $12 per front foot per annum. That is on the theory that the land was to be leased from month to month or from year to year, no additional lease or anything of that kind. I rented some property in that block on that basis—a few feet. I used a peanut stand and paid a dollar a stand. Next to the brick building.

Q. Would your answer to the foregoing question apply to block 129?

A. I don't think there is much difference in the property. It is all about the same thing.

Q. How as to lots in block 77, lots 2, 11, 12, 14, 17 and 18?

28 A. I should say that property is worth ten dollars per front foot per annum on the same basis during the same period.

Q. How as to lots 16 and 17 in block 68?

A. I would put that down at ten dollars per front foot per annum on the theory that you rent from month to month or from year to year and put no improvements on it. I consider the value of the ground very large. If you base it on a fair estimate of what it would sell for it would be very much greater than that, or if you base it on the interest on the ground.

Q. This property in blocks 68, 77, 129 and 130 is located north from the Plateau hotel, between the Plateau hotel and the bath-house on the principal streets of the city? On Central avenue?

A. Yes, part of it has two fronts; it fronts towards the Eastman hotel—blocks 130 and 129.

Redirect:

Q. Has the rental value during the time I have mentioned been greater or less than for a period of nine years prior to May, 1884?

A. They have been greater. It would rent for more money under the same conditions than prior to that time. The ground has increased in value since 1884 every year up to the last two or three years when they got it up to all there was in it.

Redirect.

By Judge McClure:

Q. Look at the letter I now hand you and state whether it is your handwriting. (Exhibits letter.)

A. Yes.

(The letter referred to as follows is introduced by defendants as an exhibit and marked Exhibit "J.")

The following is a copy:

"Resort Hotel,
Harbor Springs, Michigan, *July* 14*th*, 1887.

R. G. Davies, Esq., Hot Springs, Ark.

Dear Sir: Yours of the 7th received. In reply to Col. Ruggs' request in regard to sewer connections, you may say to him that he will be reimbursed for every dollar expended in this direction in case we recover the property in Supreme Court. Hope you and yours are well and happy.

Yours truly, A. B. GAINES."

(The original letter is attached to this testimony.)

29 J. B. Mellard, for plaintiffs, testified as follows:

Am of lawful age; residence, Hot Springs; am a real-estate agent; have been so for ten or twelve years; am familiar with the location of blocks 68, 77, 130 and 129; am familiar with these rental values in these blocks in that vicinity.

Q. As to lots seven and ten in block 130, lot seven having a frontage of 52 feet and lot ten having a frontage of 24 feet on Central avenue; what would have been a fair and reasonable rental value of this property from May 23, 1884, up to the present time, no additional rent to be considered by you on account of the existing improvements on the lots during that time?

A. Do you mean from month to month or year to year?

By the MASTER:

Q. Give it both ways.

A. That is a temporary kind of renting out.

Q. Give it also for nine years.

A. That would depend upon the condition of the lease. I think this monthly rental of ground cannot be otherwise than merely nominal rent. Various places are vacant that could not be rented for anything worth speaking of for that time. These old shacks could not be rented for anything. I had charge of some that I could not get enough out to pay taxes.

Q. On a nine-year lease what would that property have brought, during the last nine years there being no undertaking on the part of the landlord to pay for the improvements in any way?

A. No arrangement about the buildings?

Q. Yes.

A. I think you could have rented it for over ten dollars on those terms per front foot for the whole nine years' lease per annum, if it was a permanent renting or lease that anybody could put good improvements on to realize something out of—if it was a certainty or something definite. These old buildings rented that way cannot be kept in repair. The rents go down and they are hardly habitable.

Q. What would be the reasonable rental value of this property for the time mentioned if the improvements existing on them are to be paid for at the present time, but in your estimate no additional rent to be charged on account of the improvements—the time from the 23 of May, 1884, up to the present time?

A. Three, five or six dollars per foot per annum according to the location.

Q. What would be your estimate as to lots in blocks 129 and 130?

A. There is not much difference between these two blocks.

Q. How as to lots in block 77, lots 2, 10, 11, 12, 14, 17, 18?

A. This land is quite as good; not as desirable in times back; they are as good now though.

Q. From May, 1884, to the present time what difference would there be in your estimates?

A. I suppose there would be a little difference. The lots over there were not as good. In 1884 they were very poor. They have improved since and good buildings made that site more desirable. Even now—until very recently these buildings that were torn down did not pay expenses.

Q. How as to lots 16 and 17 in block 68, Mrs. Granger's and Neubert's property?

A. That was not good; that was still poorer rental until the last few years.

Q. Can you state what would have been a reasonable rental value for these two lots from May, 1884, up to the present time, no additional rent to be considered by reason of the improvements existing on the lots during that time?

A. I think it is worth less than the other block.

Q. State in figures.

A. I think two or three or four dollars a foot per annum would be a pretty fair rent for the ground if they were rented now, but they would not years ago.

Cross-examined.

By Judge McClure:

Q. You state that lots in block 77 were a little less valuable than these in 129 and 130. How did they compare with the lots in block 68?

A. It is nearer the central part of business; that in 68 was further off and not near the business part and was not as valuable as the others; 68 is a little above.

Q. So there is not much difference between the value of the lots at the lower end of 77 and 68?

A. No.

Geo. W. Baxter, on behalf of plaintiffs, testified as follows:

Examined by Mr. Greaves:

Residence, Hot Springs; resided here about 18 years; am in the real-estate business; have been in the real-estate and insurance business during my residence here; am familiar with the location of blocks 68, 77, 129 and 130.

Q. Are you familiar with the values of rent and the rental value of lands in those blocks and in that vicinity?

A. What am I called to testify for? I understand the values of the land. Upon what question am I to testify? I am familiar 31 with rental values and prices along there.

Q. What would be the reasonable rental value of lot seven in block 130, 52 feet front on Central avenue and Valley street, being occupied by Charlotte Cohn. and lot 10 in block 130, 24 feet front on both streets being occupied by J. J. Sumpter, from the 23 of May, 1884, up to the present time, a period of nine years, no additional rent to be considered on account of the improvements in existence on the lots during that time?

A. Do you mean on a lease of nine years or a tenant at will?

By the Master:

Q. Both ways. From month to month or from year to year or for the whole period of nine years.

A. If a lease could have been had of any of the property mentioned with the understanding or contract that the improvements are to be paid for at their value at the end of the term, it would have been worth ten dollars per front foot per annum. With a lease occupancy as a tenant at will I do not know that anybody would have been fool enough to give anything for it. It is simply one of these things that you might be ousted any day.

Q. Would it have been worth anything or something rented by the year without any guaranty of a longer term and without any agreement as to the buildings at all?

A. No. The only thing a lessee could do would be to put up a kind of a tent.

Q. What would you say as to a fixed term of nine years, but without any agreement that the landlord should take the buildings at their value, but let the tenant take care of himself?

A. That would be a hard question to answer. I don't know what a lessee would want to put up, I don't think a business man would lease grounds for nine years and put up good improvements without some contract to have the landlord pay for the reasonable value at the end of the term.

Q. Is it not probable that on that ground an owner would get something if he would guarantee his tenant he could keep it for nine years, although he would refuse to take the buildings? Couldn't he have gotten something for it?

A. Something he might have gotten for it. But there is a question that comes up. He could build nothing but a brick building on the ground there, and I don't know anybody that would put up a brick building. That ground is in the fire limits.

Q. You think the fire ordinance diminishes its rental value?

A. Unquestionably on that proposition.

32 Redirect:

Q. Would the rental value of open lots be greater or less for a period of nine years prior or since May 23, 1884?

A. I don't know that it would.

Q. Would it have been equal or greater or less prior to May, 1884, up to the present time? Has it rented for more since 1884?

A. I don't know what it rented for prior to that date or since.

Q. Has the rental value since 1884 been greater or less than it was prior to 1884?

A. I think not.

Q. Discarding from your mind the fire ordinances and also the improvements that are in existence on the property, what would have been the rental value since May, 1884, to the present time on a lease?

A. I think that my previous answers cover that.

Q. How as to property in block 129?

A. It is about the same thing.

Q. Property in block 77 opposite blocks 129 and 130?

A. I regard the rental value of the whole property in question about the same.

Recross.

By Mr. McClure:

Q. If the property in litigation since 1884—suppose a receiver had been appointed to rent the property from year to year, and assuming the lots to have been vacant, what rental value, in your opinion ought to have been obtained per annum per foot for that property?

(Objected to by plaintiffs.)

A. That would be doubtful whether any rent could be obtained for it at all from year to year. It might have been obtained by somebody wanting to put up a tent or a *tele*graph gallery.
Q. The rent would have been merely nominal then?
A. Yes.

Redirect:

Q. Suppose also that this property had been in possession of the tenants in these cases since May 23, 1884, what has been the rental value of the property to them, leaving out of your mind the improvements thereon?
A. I am sure I cannot answer that question. Don't know what it has been to them. I don't know what rent they have calculated.
33 Q. The question is not what rent they have calculated, but what has been a reasonable rental value to them, leaving the question of improvements out and no additional rent to be charged on account of the improvements?
A. I cannot testify as to that—what the rental value has been to them.

Recross:

Q. Would a lot have brought anything without improvements?
A. I think not.

(Adjourned until afternoon.)

John J. Ware, on behalf of plaintiffs, testified:

Examined by Mr. Greaves:

Am 41; am in real-estate and insurance business in Hot Springs; have resided there about 18 years; have been in real-estate business about six years.
Q. Since the 23d of May, 1884, have you been familiar with the valuation of lands and the rental of lots in blocks 77, 68, 130, and 129 in Hot Springs?
A. I have to some extent. I have a general idea of what rental values ought to be.
Q. What would be the reasonable value of lot seven in block 130 occupied by Charlotte Cohn and lots 10, block 130 occupied by J. J. Sumpter, from May 23d, 1884, up to the present time, no additional

rent to be charged by you by reason of the existence of the improvements on the lots?

A. I think that ground would be worth about $250 per foot. About six per cent. per annum on that valuation would be a fair rental for the ground.

Q. How as to lots four and five in block 129 formerly occupied by Patsy Dugan and the other by R. B. Allen?

A. I think those values would be about the same. I don't think there would be any difference. The property fronts on Two street and I presume the depths are the same. I think the rental values improved or unimproved would be about the same in either locality.

Q. How about lot 2 in block 77, occupied by Geo. H. Smith and lot 10 occupied by Rugg and lots 11 and 12 and lot 14 occupied by D. C. Rugg and lot 17 in the same block and lot 18 by A. S. Garnett, all in the same block?

A. How wide are these lots? If they run 22 to 40 feet, I would —
about $250. If they were smaller than that—if they were
34 small so as not to be large enough for business purposes, they
would not be worth as much and would not command so
much in the market. Any of these blocks 15 feet wide would not command $200 per foot, while a lot 25 or 30 feet by the side of it would command from $250 to $300 per foot, because they could be used for purposes that a smaller one could not.

Q. How about lot 16 in block 68, occupied by Mrs. Granger, and lot 17, occupied by Otto Neubert?

A. $250 per foot. They would be worth six per cent. on the valuation. That is, the naked ground without any improvements, for the year 1884.

Q. Does your estimate apply for 1884, or the average estimate from that time to now?

A. From that time on until now. From 1884, a contract for ten years down. There was a piece of property leased through our office a short time since. It was leased last year in block 77 for fifty dollars per month. That lease runs for seven years. The width of the lot is 25 feet frontage. We did not consider that that ground was worth fifty dollars now; but we thought before 1897 came around it would be worth more than fifty dollars per month, and that fifty dollars would be a fair rent from last year up to the end of the lease. I think if the records are examined in 1883 and 1884, that you will find that sales have been made in some of these blocks at $250 per foot in that neighborhood. It would depend on the width of the lot and the ownership of contiguous property.

Cross-examined:

Q. You make, do you not, your estimate of the rental value of the lot upon its basis of value for purposes of sale, independent of any improvement upon it?

A. Yes. I am not counting any improvements. Just estimating the ground itself. The party renting would have to improve it.

Q. Since May 23rd, 1884, the title to this property has been in litigation. State if a receiver had been appointed and required to lease that property from year to year, what rental value any of that property would have brought without any improvements upon it, assuming that the litigation was liable to terminate at any time.

Objected to by plaintiffs.

A. You mean that a tenant could not reasonably anticipate a longer lease than one year?

Q. Yes.

A. I don't know. There is a great many businesses that a man could not afford to rent property where he would only get a one year's lease. He could not afford to put up any substantial improvements. It would be a difficult matter to rent property with that kind of a tenure. It is a hard question to answer.

Q. What amount of rent could be obtained for it, if anything?

A. I did not anticipate a question of that kind. If it was me, I would not give anything for it, for this reason, there is a good deal of property in this shape. No man would do business on that block if there was a whole vacant block.

Q. Are not all these blocks within the fire limits, what is called?

A. I think they are now. But whether they were in 1884—yes, I presume they were in 1884.

Q. Under the ordinances fixing the fire limits — character of buildings were required to be put up on these blocks?

A. Brick buildings in accordance with the ordinances of the city.

Q. You stated something in your direct examination like that you thought the rental value of the lot itself ought to be equal to six per cent. of the value of the property. State, if in making this estimate, you took into consideration the absolute loss of the building which might be placed on the lot at the expiration of the time, without any compensation to the landlord?

A. No. There is always some provision by which the party putting up the building gets something for it.

Q. In a contract where there was no provision of that kind during this length of time it had to run and the party to have no compensation for his building—what would be the rental value?

A. About four per cent., or something like that.

Q. Then I understand you to say that two per cent. would pay for the value of the buildings on the property?

A. A man putting improvements under a lease would put up such improvements not to last over ten years.

Q. How long do brick buildings last in this town?

A. It depends upon how they are constructed. If they are not burned up they will last a long time. But a man under that kind of a lease would not put up brick buildings. But under the fire limits he could not put up any other kind.

By Judge McCain:

Q. You were speaking about a lease you had recently made, running for seven years at two dollars per month per front foot. Is it stipulated in that lease that the landlord is to pay the tenant at the end of the lease?

36 A. Yes; the absolute value of the building he is to pay for at the end of the term.

Q. Is there any material change in the rental value of this property between May, 1884, and the present time? Is it something more now, or is it about the same?

A. It would be worth something more just now. A man could lease property now for ten-year lease at a higher rate than in 1884, in these localities.

Q. Take a convenient lot of 20 or 25 feet, what do you think is the best you could do for an owner in renting a vacant piece of ground on lease of nine years without any agreement on the part of the landlord that he would take care of the tenant as to the buildings, but required the tenant to move the buildings off or throw them away, or lose them at the end of the term? What would be the best you could do on a nine-year lease?

A. A man would have to put up a right flimsy building to justify him in paying anything like a man could get in case there was a provision for the buildings. I would say he could not get more than one-third of what the land would command in case he could get compensation for the buildings—not more than that. A man would have to figure what his building would cost and the interest on his money, then what his building is worth after it is put up.

Q. Has it been somewhat customary in this town for land-owners to rent out their vacant lots?

A. One or two land-owners have done that to some extent, but I don't know of anything recently, except that one instance that occurred in our office. That would not establish any general rule.

Q. To what extent does the length of the term affect the changes for perfecting a lease of that kind?

A. The longer the term the higher the rent would be.

Redirect:

Q. Discarding from your mind the existence of the present improvements on these lots, or that have been on there since 1884, what has been the rental value to the occupants of this property since that time?

A. What they could have realized from it.

Q. Discarding the improvements and the rental value or capacity of the improvements, what has been the rental value to the parties in possession of this property since May, 1884, up to the present time?

A. I think the answer to the first question would answer that. It would not exceed six per cent. on a valuation of $250 per foot.

37 By the MASTER:

Q. Where these owners or claimants have had houses on this land and been enjoying the rent, how much of the rent in the last five years is fairly to be attributed to the land, and how much to be attributed to the houses on the land? Or is it possible or practicable for you to make a discrimination of that kind?

A. That would depend upon the character of the improvements and the amount invested in it. If a man had a house that cost him two thousand dollars and he got one thousand dollars per month for it, that man's land rent would look like it was more valuable to him than a man who had more grounds, but improvements that did not bring him so much. I know fifty feet of ground offered to us last year in the same block for fifty dollars per month on a 30-year lease. I accepted the proposition, but the party finally backed out; but I think he would make it yet. That contemplated substantial improvements that were to be paid for at the termination of the lease at their value.

ALF. WHITTINGTON, on behalf of plaintiffs, testified as follows:

Examined by Mr. GREAVES:

Born Feb., 1844; occupation, merchant and farmer, dealer in stone and real estate, &c.; have resided here since 1844.

Q. Are you an owner of or interested in real estate in the business part of the city?

A. Yes; I own a lot on Malvern avenue, just below the Armour Packing Company, and I am indirectly interested in the mercantile firm of Whittington, Sterns & Co., in block 68.

Q. Are you familiar with the rental values of property in the city of Hot Springs since May, 1884?

A. I have had some property in my care that I have rented; am familiar with it that far. Never paid any attention to the rents outside my affairs.

Q. What would be a fair rental value of the lots occupied by Otto Neubert, in block 68, and by Mrs. Granger, in the same block, from May, 1884, up to the present time, the existing improvements not to be considered by you in making your estimate?

A. I could answer that question by giving my own experience in that line. Up to 1884 I never had any rental down this way or any property down this way, and would not be familiar with it at that time. My experience would date from 1887 or 1888, and a piece of property, for instance, worth $8,000 would rent without any building on it, or did rent—and I considered it a fair valua-
38 tion—for $800 per year. The property is 30 feet front. That is a little over two dollars per foot per month.

Q. Where is the location of that property?

A. Lot 11, block 68.

Q. How far is this property you refer to from the property of Mrs. Granger and Neubert's?

A. I should judge about somewhere in the neighborhood of 100 or 150 feet. Right in that neighborhood. There are buildings between them—small ones.

Q. What was the length of your lease on that property?

A. Never had any lease on it. I made one for five years, but it was never signed. No lease there. It was intended to run five years.

Q. Do you consider that a fair rental value at the time you have stated?

A. I do. I was interested on both sides. I was one of the lessees, for my wife and my father was the party renting the ground, and I considered it fair. If I had not, I would not have taken it.

Q. What difference, if any, would you say there would be in rental values in the two blocks immediately north of block 68 and the block just opposite 68—block 129?

A. Block 129—taking all things into consideration, I don't think there would be a great deal of difference—that is, the property I had. My property was deeper, considerably, than that above, but the other which would make this more valuable in one sense. The other was more near the center of business and more valuable on that account. So it makes one offset the other. Block 129 would be a little more valuable than the one below on that account at that time. I don't think it is now, though.

Q. How as to block 130, just north?

A. About the same thing. Up to the time the Eastman was built there would be no difference in them.

Q. How as to block 77?

A. It would be worth so much in my opinion.

Q. What difference would there be relatively?

A. About 20 per cent. less.

Q. Were the rental values from 1884 to 1887 greater or less than they have been since 1887?

A. Previous to 1887 they were less, in my opinion. Since then they have been more.

Q. For three years previous to 1887 what amount less would they pay?

A. I don't know. I never had anything to do with any ground rents or any other rents below the Commercial block until 1887. I could not give an intelligent answer to that question.

39 Cross-examined:

Q. In making your estimate of the rental value of unimproved property, you made it upon a basis of ten per cent. on the value of the property. That is to say that a lot worth $8,000, the rental value to be about $800 per annum. That is ten per cent.?

A. I did not state that, however. But that is about what it would be. That is what we base it on. The cost of the property.

Q. What character of structure, ordinarily, is made upon a lot of that character—say one worth $8,000—what would be the value of the structure under your city ordinances?

A. I don't know what the city ordinances are.

Q. They require a brick building?

A. The buildings ordinarily put in there for that building would cost somewhere in the neighborhood of $8,000 to $10,000.

Q. When such a building had been placed on there, what would have been the total cost of the building and lot?

A. About $18,000.

Q. What would be the fair rental value of that investment now?

A. I don't know that I understand you exactly?

Q. It would be ten per cent. on the additional cost?

A. Yes. 10 per cent. on the cost of the building would be a fair rental value.

Q. That would be $1,800 per year?

A. Yes.

Q. That is the process by which you arrive at the rental value?

A. That is the way we arrived at our deal. We simply agreed to pay ten per cent.

Q. Were you interested in the construction of the *lot* on block 68?

A. Yes.

Q. What is the depth of the building?

A. 160 feet.

Q. What is the depth of the Neubert and Granger property?

A. The depth it not as great as the property we occupy.

Q. Are either of the lots as valuable for building purposes as the one 160 feet?

A. The way the property is situated, I would consider one lot almost of the same value to the front of it. The upper one would be less depth, but closer to the corner, which would make it more valuable. The nearness to the corner would offset the other.

Q. What is the width of the lot upon which you built?

40 A. 32 feet to the front, and in the rear about 28 feet—about that.

Q. What is the cost of the building placed on the lot?

A. The cost of our building without any fixtures (are) $14,000.

Q. Including fixtures?

A. A little over $16,000.

Q. And the lot was put in on a basis of eight thousand dollars?

A. Yes.

Q. $24,000 for the building and lot?

A. Yes. I was speaking of the buildings ordinarily erected here.

Q. Yours is a first-class one?

A. Yes; heavier than they ordinarily build.

Q. What is the rental value of this property per annum—you own?

A. I don't scarcely know what it would rent for or what it is worth. It would be worth to our firm——

Q. If you had to rent it, what would you get for it?

A. We would get $2,500 per year for it.

Q. Suppose your firm was to go out of existence, what would anybody give for it for rent?

A. That I could not say. That would depend upon what it was used for. I presume it could be rented for that on the public market—I can't say exactly what.

Q. Suppose the title to the property had been in litigation since May, 1884, and had continued in litigation down to the present time, and a receiver had been appointed to rent the property, bearing in mind that nothing was to be added by reason of the buildings upon it—simply the vacant ground—and that an account was to be stated for rents at the end of each year, and that none but a brick building could be erected upon that class of property, what rental value could have been obtained from any of these lots per annum?

(Objected to by plaintiffs.)

A. Just take the lot as it is and the buildings off of it and then you would have to erect a building in order to make it productive without any chances of holding it?

Q. Yes; rent by the year and get nothing for the building at the end of the term.

A. It would not be worth anything to me under those circumstances. I don't know what it would be worth to other people.

41 By the MASTER:

Q. About the deed you made with your father—did you put that building up during that five years you started?

A. Yes.

Q. Have any definite arrangements about compensation after the lease was out?

A. The lease was never signed through a mistake. We were to erect a building on the ground. We were to pay $800 per year. Then we were to erect a substantial brick building and were to pay the taxes, all cost of the building and at the expiration of the lease, he was to take the building at an appraised value by three disinterested parties at what the building was worth at that time, or was to continue the lease at the same terms until we saw fit to take it.

Redirect:

Q. As administrator or executor, have you leased any property in the vicinity of the block?

A. As executor of my father's estate, I leased two pieces of property just across the creek from us on Malvern avenue. One piece adjoins the Armour Packing Company; 75 feet front. It is either lot 7 or 8. At any rate, that piece I leased to the Armour Packing Company for nine years at a rental of $25 per month, or $300 per year. They pay all taxes—city, county, municipal, sewer and all other taxes. Then I leased the lower end of the property, 75 feet, to Mr. Cooper for the same length of time for the same rental. The Cooper property is a great deal deeper than the other property, being closer to the corner. I considered them worth alike.

Q. How far are they from block 68 on a straight line?

A. Some 200 or 250 or 300 feet.

Q. Is Malvern avenue as desirable a street for business as Central avenue?

A. I should think not. It is not from a business standpoint. Not in the center—from my standpoint.

By Judge McClure:

Q. They were nine-year leases in the beginning?

A. Yes. They were to run ten years. I made the leases so as to include ten years from the time of my father's death in 1890. They were to expire in 1900.

Q. What provisions are there as to the improvements?

A. One of them was to revert to the heirs at the expiration of the lease—the one with the brick building.

Q. How about the other one?

42 A. It was a little complicated. They had an old frame building they wanted to move on a lot to get around the city ordinances. That goes to the estate, is my remembrance of it. One of them reverts back. The other one if it was consumed, or a brick building was put up, I was to pay fifty per cent. on the appraised value of the building.

Q. These leases were to property to which you had an absolute title?

A. Yes.

Q. There wasn't any litigation about it and the tenure liable to cease at any time?

A. No.

Q. What difference would that make in the leasing of the property where it was in litigation and the tenure of the tenant was to cease at the expiration of the litigation and pass from one person to another any day?

A. That would make a vast difference to me. It would not be worth very much money. I think the Armour Packing Company lot was 66 feet front.

Q. How are the depths of the lots as compared in block 130 with those in block 68 where you built?

A. My lot below in block 68 is 100 feet deeper than that one up there.

Q. The lot of 23 feet up there and 55 feet depth would you regard it as valuable per foot per month as one in block 68 with 33 feet front and 172 depth?

A. The values as to the real estate would be very little difference in it.

Q. Was that lot up there with 33 feet width and 55 depth just as valuable as this one down there?

A. There would be very little difference per front foot. It is eight feet more in the frontage.

Q. The difference in the frontage would be the only difference?

A. Yes. All the same. The one up there is more in the heart of the business—good streets on both sides of it.

Q. It is not quite as big?

A. No. Not so much depth.

Q. Where is the heavy business in this town done—that lot 10 in block 140 and your lot in block 68?

A. We are getting more towards the center of the business part of town now. But in 1887 it was not so, the business was further up.

Q. When did it move this way?

A. It has been moving gradually. It commenced moving then. It was going this way south then. I had a hard fight to get my partner to consent to move this way then. This property leased to Cooper is in block 69.

43 SATURDAY, *April* 15*th*, 1893.

D. C. RUGG, on behalf of defendants, testified:

Examined by Judge McCLURE:

Q. State whether you are acquainted with the property in dispute in blocks 68, 77, 129 and 130.

A. Yes.

Q. The property of Mrs. Granger and Otto Nubert is in block 68. State what would have been a fair rental value for that property during the pendency of the litigation in relation to the title, per annum from May 23d, 1884, down to the present time, not including anything by reason of improvements upon the property.

A. The value would be merely nominal.

Q. What do you mean by nominal?

A. It would be nothing. That appears to be a singular question. But I will tell you why. It would be nominal for the reason that the property was in litigation and known to be so. And it would have been impossible for any person desiring to rent it to guarantee any specific occupancy of any length of time by reason of the fact that he could not possibly know at what period of time the litigation would end. It is nominal for this reason further—there is other property in the town involved in the same litigation situated practically the same as that is that has no improvement upon it and has not had for the last several years. The parties owning it, or thinking they own it—the parties in whose possession it was, have not been able to find a tenant for it on any terms. That is how I base my statement that it would be merely nominal.

(Answer objected to by plaintiffs.)

Q. To what property do you now specifically allude to?

A. In the possession of Smith—and lot 10 in block 77 in my possession.

By Judge McCAIN:

Q. Do you mean that is the property you have been trying to secure some income from and cannot?

A. Yes. It is bringing me none today and Smith's is in the same attitude. I know it is a well-known fact that no one will dispute. Three years ago the improvements on Mr. Smith's property burned and the property has been lying vacant ever since.

Redirect:

44 Q. State if your answers in relation to the property in block 68 are equally applicable to the property in dispute in blocks 77, 129 and 130.

A. Yes. Entirely so.

Q. State anything else in that connection in relation to these values that you care to.

A. I would state that it strikes me as a citizen of this town, advising myself as far as possible, divesting myself, as far as possible to do so of any unconscious interest in the case that it is manifestly improper, injudicious and unfair—(headed off by the master). As I am asked to give information in regard to the case I will proceed to give some from Mr. Cox's report. As to lot No. 10 block 77, by some (inscrutible) process entirely unknown to me, he finds that the ground rent of lot 10, block 77 is $300 per year. He finds that the rent of the ground with the improvements is worth $400 per year; that the value of the improvements is $700. In reference to lot 14, block 77, the same august authority finds the ground is worth $162.50 per annum; that the ground rent with the improvements is worth $420, and the value of the improvements $500. I hope the man if dead is in heaven.

(Objected to answer by plaintiffs.)

Q. H——

Cross-examined.

By Mr. GREAVES:

Q. What amount do you receive per month on lot 10 in block 77?

A. Nothing.

Q. What have you been receiving from the tenant on there for the last two or three months?

A. Nothing. Occasionally I have received ten dollars per month and sometimes $20 per month.

Q. What is your contract with your present tenant?

A. I don't know. Some man came to me and wanted to occupy the property and paid me some rent for it.

Q. How much?

A. I don't know. I have kept no account of it.

Q. Hav'n't you any recollection of how much he paid you per month?

A. He made on one of the months one payment of $20.

Q. How much do you receive per month for lot 14 block 77 at the present time?

A. $30.

Q. State if you can what ground rent the firm of Whittington, Sterns & Co. paid on the lot in block 68 south of Mrs. Granger's property.

A. I haven't the least idea.

45 Q. What amount of ground rent does C. J. Orr pay on lot 3 block 77 south of Smith's lot that you have referred to?

A. I haven't the least idea.

Q. Do you base your opinion in your previous answers on your knowledge of the rental value in block 77 belonging to Smith alone or upon any other information?

A. I have not stated any opinion at all. I have stated facts.

Q. Do you know what Hogoboom pays ground rent on Valley street opposite block 129?

A. I do not.

Q. Do you know what rental values are in other blocks of the city in the business part?

A. Yes, somewhat. I have some information about it.

Q. State as to block 89.

A. Where the property is not in litigation there is a tangible rental value for unimproved property for ground rent.

Q. What is it?

A. Between one and two dollars per foot. Further above that is—block 89 does not come down as low as block 77. And I stated that not as a matter of opinion, but as a matter of fact. Because I have two lots in block 89 that have 47 feet frontage for which I get $83.00 per month, and they are corner lots. One of them is. They amount to all corner lots because it comes to the corner and it is more valuable than the property east—on the street. It is from year to year. It was originally five years. Then it was fifty dollars per month for 47 feet, which would make it about $1.00 or a little over per front foot per month. That is where my tenure has proven to be absolute.

Q. What became of the improvements at the end of five years?

A. They are there still.

Q. To whom do they belong?

A. To the lessee. And instead of moving them off or making any disposition of them he preferred to give me $83 per month rather than take them away, and he is doing it now.

Q. At the corner of Mountain street block 89?

A. Yes. I have another lot on Central avenue of thirty-two feet front covered by a two-story building brick which I rent for $25.00 and am glad to rent it at that. The lessee was in here this morning—Geo. H. Riley. I have other property handsomely improved on Central avenue as advantageously located as this in litigation, which I would be glad to get one dollar per foot for with the improvements on it today. One instance is this very room we are in which has 60 feet frontage. I would be glad to get $50 per month for it with all the improvements and the furniture in it.
46 And the plaintiffs can have it today. I have other property in town. A man occupies a handsome room of ten feet front and 40 depth for which I get $20 per month and am glad to get it. I have other property in town handsomely improved and valuable and in a good neighborhood for which I get nothing. That is about the rental value of property in Hot Springs.

Q. What amount of rent do you get for a lot that you own in block 68, near Mrs. Granger's?

A. $60 per month.

Q. It is the lot adjoining hers on the south?

A. Yes. That property has been vacant a good deal of the while since I owned it. Now it is rented for a special purpose. It has a gambling hall and saloon on it. For ordinary purposes, I would be glad to rent it for anything I could get.

LUCIEN FARMER, for defendants, testified:

Age, 44; residence, Hot Springs; business, insurance and real-estate agent. Have resided here about 12 years. Been in real-estate business about three years.

Q. Are you acquainted with blocks 77, 68, 129 and 130?

A. Yes.

Q. There are several lots in each block in controversy. Please state what would be a fair rental value per annum, taking into consideration that the lots have been in litigation and the tenure liable to terminate any time, irrespective of the improvements? That is, leaving out of consideration the improvements now upon the lots and treating it from the standpoint that it was open property. What would be a fair rental value per annum per front foot for lots along in that locality in any one of these blocks—no provision being made for the payment of the improvements at the end of the term, just one year's lease?

A. It would be a very small rental. I could not say what it would be worth. Probably from one to two dollars per front foot.

Q. For how long?

A. For a year.

Q. Then a lot of 25 feet front would not be worth any more than $25 per annum?

A. No; not over fifty dollars per annum.

Q. What character of improvements could be made upon that lot under a one year's lease that would earn money, no provision for the payment of the buildings at the expiration of the lease?

A. Just some temporary structure—very temporary.

47 Q. Would the city ordinances allow the erection of what you would call a temporary structure?

A. No; they are all in the fire limits.

Q. Taking that into consideration, nothing but a brick building could be erected, what could be obtained under the circumstances I have named?

A. A nominal rent.

Q. How much?

A. I doubt whether anything could be obtained unless a temporary structure could be made.

Q. But a temporary structure could not be made?

A. Well, sometimes there are permits for temporary structures granted.

Plaintiffs object to the foregoing testimony because the same is not responsive to the inquiries in the decree.

Cross-examined:

Q. Are you familiar with the location of property just opposite the Gaines block, in block 68?

A. Yes.

Q. Would you consider this permanent or temporary structures?

Objected to by defendant upon the ground that the property in block 68 is not in dispute, and does not come within the scope of the master's inquiries, and that the testimony should be confined to some one or more of the lots, the rental value of which is to be fixed by the commissioner. Objection sustained by the master.

Plaintiffs' counsel offers to read in evidence the original leases, being the same or some of the leases which already appear in the record in these cases, and the assignment of the leases, and also deeds from lessees; to the introduction of which defendants object upon the ground that they did not go into possession under the alleged leases or deeds.

The documents are considered by the master as admitted, subject to these objections, which are to be considered later.

It is agreed by counsel that the defendants have retained possession of this property in all cases up to the time of the taking of this testimony, except lot 4 in block 129, Patsy Dugan, defendant, and lot 17 in block 77, James Madison, defendant, in which two cases possession was delivered to the plaintiffs, or the trustees of the plaintiffs, on the 21st day of April, 1888.

48 *Master's Report.*

In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WM. H. GAINES *et al.*
vs.
VINA GRANGER.

Lot 10, block 68, 21.6 feet front.

To the Honorable Henry C. Caldwell, judge of said court:

The undersigned master reports the statement of account in this case as follows:

Credits:

Paid Government	$160 00
Interest	108 40
Value of improvements (building)	2,500 00
Value of plumbing	125 00
State and county taxes	512 00
Interest	109 80
Sewer tax	83 00
Interest, three years	7 74
	$3,605 94

Debits :

Rent from May 23d, 1884, to April 28th, 1893, at 50 cents per front per month...........	$1,014 07	
Interest to April 28th, 1893.................	275 64	
		1,289 71
Balance due Mrs. Granger......		$2,316 23

The testimony in Gaines *vs.* Rugg, No. 647, is here referred to.
Respectfully submitted.

W. S. McCAIN, *Master.*

Indorsed : Filed May 5, 1893. Ralph L. Goodrich, clerk.

Which exceptions to report of master is as follows :

United States Circuit Court for the Eastern District of Arkansas, Western Division.

William H. Gaines *et al.*
vs.
Vina Granger.

Come the said plaintiffs and except to the report of the master herein, because :

49 1st. He erred in allowing the defendant $2,500.00 for improvements.

2nd. In allowing her $125.00 for plumbing.

3rd. And in allowing her $512.00 and interest for State and county taxes.

4th. And in allowing her $83.00 and interest for sewer taxes.

5th. And in allowing the plaintiffs only $1,014.07 for rents, said sum being grossly inadequate.

U. M. & G. B. ROSE.

Indorsed : Filed before me May 3, 1893. W. S. McCain, master. Filed May 5, 1893. Ralph L. Goodrich, clerk.

And on January 23rd, 1894, the following proceedings were had before Hon. Henry C. Caldwell, circuit judge :

Decree.

William H. Gaines ; Albert Gaines, as Executor of the Last Will and Testament of Maria Gaines, Deceased ; William H. Gaines, Jr., Fannie G. Williamson, Louisa Blasdell, Augusta Stitt, Mary P. Gaines, and Abner B. Gaines
vs.
Vina Granger.
655.

Now on this day came said plaintiffs by U. M. & G. B. Rose, Esqs., their solicitors, and also came said defendant by John McClure, Esq., her solicitor, and the exceptions filed to the report of

the master herein being now submitted to the court, and the court having heard argument of counsel, and being now fully advised in the premises, it is now ordered, considered and decreed that said exceptions be and the same are overruled, to which rulings said plaintiffs at the time except. And it is further decreed that said plaintiffs pay said defendant the sum of two thousand three hundred and sixteen dollars and twenty-three cents ($2,316.23), the amount found due her by the master, and that she have execution thereof as at law. And the plaintiffs pray an appeal to the United States circuit court of appeals, which is granted. And it is ordered that the penalty of the supersedeas bond herein be fixed at one and one-half times the sum above decreed to said defendants. It is further ordered and decreed that W. S. McCain, the master herein, be allowed seventy-five dollars for his services in this cause, he to pay the stenographer, and that the same be taxed as costs in this
50 cause, each party to pay one-half thereof, and this sum with all costs shall be paid, not to the parties, but shall be paid into the registry of the court.

And on February 6th, 1894, the following proceedings were had before Hon. John A. Williams, district judge:

William H. Gaines *et al.*
vs. } 655.
Vina Granger.

Now on this day came the said plaintiffs by U. M. & G. B. Rose, Esq., their solicitors, and also came the said defendant by her solicitor, John McClure, Esq., and on the motion of the plaintiffs, the order heretofore made herein during the present term praying and granting an appeal from the final decree in this cause is set aside. And by leave of the court said plaintiffs file here their petition for appeal, and their assignment of errors; and thereupon the prayer of said plaintiffs for an appeal to the United States circuit court of appeals for the eighth circuit is granted. And said plaintiffs having filed a supersedeas bond herein, which has been approved by the judge of this court, it is ordered that the money decree herein rendered against said plaintiffs be superseded until the decision of the cause on appeal.

Which petition for appeal and assignment of errors is as follows:

United States Circuit Court for the Eastern District of Arkansas,
Western Division.

William H. Gaines *et al.*
vs.
Vina Granger.

Come the said plaintiffs and pray an appeal from the decree rendered in this cause to the United States circuit court of appeals for this circuit, and make the following assignment of errors:

First. The court erred in computing rents at a less sum than that contracted for by the lease under which defendant held the lot in controversy.

Second. The court erred in computing the rents at a less amount than was shown to be due by the testimony in this cause.

U. M. & G. B. ROSE,
For Plaintiffs.

Filed February 6, 1894.

RALPH L. GOODRICH, *Clerk.*

51 Which supersedeas bond is as follows:

Know all men by these presents: That we, U. M. Rose and G. B. Rose are held and firmly bound unto Vina Granger in the full and just sum of thirty-five hundred dollars to be paid to the said Granger, her heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 5th day of February in the year of our Lord one thousand eight hundred and ninety-four.

Whereas, lately at the October term, A. D. 1893, of the circuit court of the United States for the western division of the eastern district of Arkansas, in a suit depending in said court in chancery between William H. Gaines *et al.*, plaintiff-, and said Granger, defendant, a decree was rendered against the said Gaines *et al.*, and the said Gaines *et al.* have obtained an appeal from the said court to reverse the decree in the aforesaid suit to the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now the condition of the above obligation is such that if the said Gaines *et al.* shall prosecute said appeal to effect, and answer all damages and costs if — fail to make good their said appeal then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of—

(Signed) U. M. ROSE. [SEAL.]
G. B. ROSE. [SEAL.]

Approved by—
JNO. A. WILLIAMS,
U. S. Dist. Judge.

Indorsed: Filed Feb'y 6, 1894. Ralph L. Goodrich, clerk.

UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas. }

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the western division of the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, and of the assignment of errors, and all papers, pleadings and orders relating to the report of the master in case of Wm. H. Gaines *et al. vs.* Vina Granger.

52 In witness whereof, I have hereunto set my hand and the seal of said court, this second day of April, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and eighteenth.

The Seal of the Circuit Court, U. S. A., Western Division of East. Dist. Ark.

Attest: RALPH L. GOODRICH, *Clerk.*

Filed Apr. 5, 1894.

JOHN D. JORDAN, *Clerk.*

In the Circuit Court of Appeals for the Eighth Circuit, December Term, 1894.

G. G. LATTA, Executor,
vs.
VINA GRANGER.

A copy of the deposition of Vina Granger now on file in this cause in the court below not having been included in the transcript, it is now agreed that the following is a copy of said deposition and that it may be filed in this court in this cause, to be considered by the court as a part of the record and transcript of this cause with the same effect as if a certiorari had been issued, and said copy of said deposition had been brought here duly certified by the clerk in response thereto, this October 8, 1894.

ROSE, HEMINGWAY & ROSE,
For Appellants.
JOHN McCLURE.

Deposition of Vina Granger.

United States Circuit Court for Eastern District of Arkansas.

PERRY HUFF, VINA GRANGER, AVA M. JAMES.

Deposition.

Mrs. VINA GRANGER, being first duly sworn, deposes and says:

My name is Vina Granger. I reside in Hot Springs, Arkansas, and I am proprietress of the Madison house. I have been in possession of the Madison house under my purchase since the 14th day of March, 1880. They are the premises described in the complaint. I got possession under warranty deed from Perry Huff and wife, executed by them and acknowledged on that date and filed and recorded in the recorder's office of Garland county about that time.

53 I paid the grantor, Perry Huff, for said lot, at the date of said conveyance, $2,650 cash.

I did not know of any other claimant or pretended owner at the time I bought said premises. I knew of no claim made by the plaintiffs at the time I bought. I had never interrogated either of the plaintiffs whether they had any claim to it or not. I have been in possession of the property ever since my said purchase from Perry Huff.

Neither the plaintiffs or any agent had ever demanded of me the possession of the property or rents for the same up to the present time.

I was served with a summons about May or June, 1884, in this action, which was the first notice I had of the claim of the plaintiffs since I bought from Perry Huff.

I knew nothing of any relation of landlord between the plaintiffs and Perry Huff when I purchased.

I did not know how Mr. Huff acquired possession.

I did not know anything about his acquiring possession.

I took his warranty deed, and I didn't look any further; he was in possession.

X ex'n:

I have been in Hot Springs 11 years last November. I leased ground of Major Gaines at what is now Bridge St. and Central avenue. I didn't know whether the Perry Huff property belonged to Gaines or Belding or to either of them. I know the part we were on was in contest, but the other I did not. I made no effort to find out whether it was in contest or not. I don't know whether the purchase-money to the Government was paid or not when I purchased.

VINA GRANGER.

No. 446. G. G. Latta, executor, &c., *et al.*, appellants, *vs.* Vina Granger. Amendment to transcript of record. Stipulation and copy of deposition, Vina Granger. Filed Nov. 10, 1894. John D. Jordan, clerk.

54 And on the fifth day of April, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals a petition for and order enlarging time to file record in words and figures following, to wit:

United States Circuit Court, Eastern District of Arkansas, Western Division.

William H. Gaines *et al.*, Plaintiffs,
v.
Vina Granger, Defendants.
} In Chancery.

To the Hon. H. C. Caldwell, one of the judges of the United States circuit court of appeals for the eighth judicial circuit, plaintiffs state—

That they appealed from the final decree entered in this cause on the 6th day of February, 1894, and that at the same time like appeals were taken by them from final decrees rendered on the same day in eight other cases, they being plaintiffs in all of said causes, all of the cases involving the same questions; that the transcripts in all of said cases are voluminous, and that the clerk has not been able and will not be able during the sixty days allowed by the rules of the court to make out the transcripts in this and the other cases.

Wherefore plaintiffs pray that your honor will allow an additional period of sixty days for the purpose of filing a transcript in this cause.

Respectfully, ROSE, HEMINGWAY & ROSE.

We certify that the facts above stated are true.
March 28, 1894.

U. M. ROSE, *Sol. for Plaintiffs.*
RALPH L. GOODRICH, *Clerk,*
By W. P. FEILD, *D. C.*

In accordance with the above application, the time for filing the transcript in this cause with the clerk of said circuit court of
55 appeals is extended for sixty days from this date.
Given under my hand this 30th day of March, 1894.

HENRY C. CALDWELL,
U. S. Circuit Judge.

Endorsed: "No. 446. William H. Gaines *et al.*, appellants, *vs.* Vina Granger. Petition for and order enlarging time to file record. Filed Apr. 5th, 1894. John D. Jordan, clerk."

And on the ninth day of April, A. D. 1894, an appearance of counsel for appellants was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

WILLIAM H. GAINES *et al.*, Ex'rs, &c., *et al.*, Appellants,
vs.
VINA GRANGER.
No. 446.

The clerk will enter our appearance as counsel for the appellants.

U. M. ROSE.
W. E. HEMINGWAY.
G. B. ROSE.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 446. Wm. H. Gaines *et al.*, ex'rs, &c., appellants, *vs.* Vina Granger. Appearance. Filed Apr. 9, 1894. John D. Jordan, clerk. U. M. Rose, W. E. Hemingway, & G. B. Rose, Little Rock, Ark., counsel for appellants."

And on the fifteenth day of June, A. D. 1894, an appearance of counsel for appellee was filed in the clerk's office of the circuit court of appeals in the words and figures following:

56 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

WILLIAM H. GAINES *et al.*, Appellants, } No. 446.
vs.
VINA GRANGER.

The clerk will enter my appearance as counsel for the appellee.
JOHN McCLURE.

Endorsed: "U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 446. William H. Gaines *et al.*, appellants, *vs.* Vina Granger. Appearance. Filed June 15, 1894. John D. Jordan, clerk. John McClure, Little Rock, Ark., counsel for appellee."

And on the sixteenth day of June, A. D. 1894, there was filed in the clerk's office of the said circuit court of appeals a petition and stipulation to revive cause in the words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

WILLIAM H. GAINES, Appellant, } No. 446.
vs.
VINA GRANGER, Appellee.

Comes your petitioner, G. G. Latta, and shows to the court that since this appeal was taken and perfected the plaintiff, William H. Gaines, has died, resident of the county of Garland, in the State of Arkansas, leaving a last will and testament, by which he appointed and constituted your petitioner executor of said last will and testament, and that since that time your petitioner has sued out letters testamentary on such last will and testament from the probate court of said county, and, having duly qualified as such, is now engaged in the execution of said will.

Therefore your petitioner prays that this suit may abate as to said William H. Gaines, and that it may be revived in his name as executor as aforesaid.

G. G. LATTA,
57 By ROSE, HEMINGWAY & ROSE,
Of Counsel.

In the United States Circuit Court of Appeals for the Eighth Circuit.

W. H. GAINES *et al.*, Appellant-, } No. 446.
v.
VINA GRANGER, Appellee.

Whereas since the appeal taken in this cause the appellant William H. Gaines has departed this life, resident in Garland county, Arkansas, leaving a last will and testament by which he appointed George G. Latta executor thereof, and said Latta has since that time duly proved said will in the probate court of said county and has sued out letters testamentary thereon and has qualified as such executor: Now, therefore, it is agreed by counsel that this suit may abate as to said William H. Gaines, deceased, and that it may be revived in the name of said George G. Latta, as executor of his said last will and testament.

Given under our hands this 12th day of June, 1894.

ROSE, HEMINGWAY & ROSE,
Counsel for Appellants.
JOHN McCLURE, *Counsel for Appellee.*

Endorsed: "446. Wm. H. Gaines *et al. vs.* Vina Granger. Petition to revive. Filed June 16, 1894. John D. Jordan, clerk. Rose, Hemingway & Rose."

And on the eighteenth day of June, A. D. 1894, in the record of the proceedings of said circuit court of appeals is an order reviving cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

MONDAY, *June* 18, 1894.

58 WILLIAM H. GAINES *et al.*, Appellants, *vs.* VINA GRANGER, Appellee. } No. 446.

Appeal from the circuit court of the United States for the eastern district of Arkansas.

This cause came on this day to be heard upon the petition of appellants and the stipulation, signed by counsel for both the parties, to revive this cause as to the estate of William H. Gaines, lately deceased.

On consideration whereof it is now here ordered by this court, in pursuance of the said petition and stipulation, that G. G. Latta, executor of the estate of William H. Gaines, deceased be, and he is hereby, substituted as appellant in the place of said William H. Gaines, deceased, and that this cause be, and the same is hereby, revived in the name of said G. G. Latta, executor, etc.

June 18, 1894.

And on the tenth day of November, A. D. 1894, there was filed in the clerk's office of said circuit court of appeals a stipulation as to printing record, etc., in the words and figures following, to wit:

In the Circuit Court of Appeals for the Eighth Circuit, December Term, 1894.

G. G. Latta
vs.
Vina Granger. } No. 446.

G. G. Latta
vs.
Otto Neubert. } No. 451.

G. G. Latta
vs.
Charlotte Cohn. } No. 457.

G. G. Latta
vs.
D. C. Rugg. } No. 458.

G. G. Latta
vs.
A. S. Garnett. } No. 459.

59 G. G. Latta
vs.
John J. Sumpter *et al.* } No. 460.

G. G. Latta
vs.
D. C. Rugg. } No. 477.

As the same question is presented in all of these cases, it is agreed by counsel that the record shall be printed in the case No. 446, G. G. Latta, executor, *vs.* Vina Granger; that that case shall be submitted and argued, and that all the other cases above mentioned shall abide the decision made in that case, a similar decree being taken in each of the other cases.

Nov. 8, 1894.

ROSE, HEMINGWAY & ROSE,
For Appellant.
JOHN McCLURE.

Endorsed: "G. G. Latta, executor, &c., *et al.*, appellants, *vs.* Vina Granger, No. 446; Otto Neubert, No. 451; Charlotte Cohn, 457; D. C. Rugg, 458; A. S. Garnett, 459; John J. Sumpter *et al.*, 460; D. C. Rugg, 477. Stipulation as to printing record and decree in circuit court of appeals. Filed Nov. 10, 1894. John D. Jordan, clerk."

And on the eleventh day of January, A. D. 1895, in the record of the proceedings of said circuit court of appeals, is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1894.

FRIDAY, *January* 11, 1895.

G. G. LATTA, Executor of Estate of William H. Gaines, Deceased, *et al.*, Appellants,
vs.
VINA GRANGER, Appellee.
} No. 446.

Appeal from the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing, and Judge Caldwell, being disqualified by reason of having sat at the hearing in 60 the court below, retires and takes no part in the hearing of this cause; thereupon argument was commenced by Mr. U. M. Rose in behalf of appellants, continued by Mr. John McClure in behalf of appellee, and concluded by Mr. U. M. Rose for appellants, and submitted to Judges Sanborn and Thayer upon the transcript of the record from said circuit court and the briefs of counsel filed herein.

And on the 6th day of May, A. D. 1895, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

61 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1895.

G. G. LATTA, Executor of the Estate of William H. Gaines, Deceased, *et al.*, Appellants,
vs.
VINA GRANGER, Appellee.
} No. 446. Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. U. M. Rose (Mr. W. E. Hemingway and Mr. G. B. Rose were with him on brief) for appellants.

Mr. John McClure for appellee.

Before Sanborn and Thayer, circuit judges.

Statement.

The material facts out of which this suit arises are as follows: On June 26, 1875, the appellants' testator, William H. Gaines, being in possession of lot sixteen (16) in block sixty-eight (68) of the city of Hot Springs, Arkansas, under a claim of ownership, leased the lot for one year, with the right of renewal from year to year, to Perry Huff. Huff occupied the lot under said lease until June 1, 1876, when the United States took possession of the lot as property belonging to the United States, ousted the then occupants, and subsequently leased the lot to Huff through the agency of a receiver appointed by the Court of Claims. On March 17, 1880, Huff sold all his right, title and interest in the lot to Vina Granger, the present appellee, and to Eva M. James, the latter persons well knowing that all of Huff's interest in the lot was derived from the aforesaid leases from Gaines and from the United States. Subsequently the commissioners appointed pursuant to the act of March 3, 1877, 19 Stat. 377, ch. 103, to adjust conflicting claims to land situated within the Hot Springs reservation, awarded to Perry Huff the right to purchase the lot now in controversy, and the latter purchased the same and received a patent therefor from the United States. After the decision in Rector *v.* Gibbon, 111 U. S. 276, to wit: on May 23, 1884, this action was begun by the present appellants against Perry Huff, Eva M. James and Vina Granger to compel them to transfer the legal title, so as aforesaid acquired from the United States, to the appellants, upon the ground that the legal title acquired by them from the Government was held in trust for the appellants.

A decree as prayed for was rendered by the circuit court
62 against the appellee, Vina Granger, in April, 1887, the suit
having been theretofore discontinued as against Huff and James. From said decree an appeal was prosecuted to the Supreme Court of the United States by the appellee. By the decision of the Supreme Court on such appeal the present appellants' right to the lot in controversy was established and confirmed, but the decree in their favor was reversed, because the account as to rents and profits had not been properly stated and because the allowances in that behalf made were deemed inequitable. The decision of the Supreme Court is reported under the title of Goode *v.* Gaines, 145 U. S., 141, 154.

The second trial of the case resulted in a decree against the appellants for twenty-three hundred and sixteen dollars and twenty-three cents, that being the sum which the master found had been paid by the appellee, Vina Granger, for taxes and for improvements made on the lot and in obtaining a title to the land from the United States, over and above the sum justly chargeable to her on account of rents and profits. From the last-mentioned decree the appellants have prosecuted an appeal to this court.

THAYER, J., after stating the case as above, delivered the opinion of the court:

The present appeal presents but two questions for our consideration. The first is, whether the master should have computed the rents of the property in controversy at the rate specified in the lease from Gaines to Huff of date June 26, 1875, and the second is, whether the sum allowed by the master on account of rents was too small, even though the aforesaid lease does not govern in determining the rental value of the property. The appellants maintain the affirmative of both of these propositions.

It will be observed by reading the opinion rendered in this case on the former appeal to the Supreme Court of the United States, *vide* Goode *v.* Gaines, 145 U. S. 141, 154, that the first decree was reversed because the allowance in favor of the present appellants on account of rents was deemed excessive and inequitable, in view

of the peculiar relations of the parties to the suit, and the cause was remanded to the circuit court solely for the purpose of having the rent account restated. The lease executed by Gaines in favor of Huff was described in the bill of complaint, and the terms and conditions thereof as well as the amount of rent therein reserved, could not have escaped judicial observation. Nevertheless no direction was given to the circuit court to cause the rents on a second hearing to be computed at the rate reserved in the lease, nor was any intimation given to that effect. After pointing out the circumstances that had given rise to the litigation and after alluding to the fact that the defendants had not acted knavishly or in bad faith, the Supreme Court said, in substance, that the defendants ought not to be charged with the rents prior to May 23, 1884, that being the date when the suit was instituted; that they should simply be charged with the rental value after that date, and that "no increased rent should be allowed on account of the improvements." If the court had intended that
the rents should be computed at the rate fixed in the
63 lease, and that the lease should control in estimating the
rental value, it is obvious that the clause above quoted from
the opinion would have been entirely unnecessary. We think, therefore, that the decision directed the circuit court, in effect, to ascertain the fair rental value of the lot without reference to the rent reserved in the original lease, and upon that theory the circuit court evidently acted.

It may be well to observe in support of the view which appears to have been taken by the Supreme Court, that, inasmuch as the appellee, Vina Granger, bought the lot in controversy from Huff in the year 1880, after the latter had been ousted of possession under the lease, and had attorned to the United States, the true owner, it is by no means apparent that any such privity existed between her and the original lessor, Gaines, as would, in any event, render her amenable to the provisions of the lease and liable for the rent therein reserved. But be this as it may, it was clearly the duty of the circuit court to follow the directions given by the Supreme Court in the opinion delivered on the first appeal, and having done so no error was committed of which the appellants can be heard to complain on the present appeal.

With respect to the second question above proposed, it is sufficient to say that the evidence contained in the record is not of such character as would warrant us in overruling the finding of the circuit court, and the finding of the master as well, with respect to the rental value of the property in controversy. In Warren *v.* Burt, 12 U. S. App. 591, 600; *id.* 7 C. C. A. 105, this court said that where the trial court has considered conflicting evidence and made its finding thereon, the finding must be taken as presumptively correct and must be permitted to stand unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. To the same effect are the decisions in Tilghman *v.* Proctor, 125

U. S. 136; Kimberly *v.* Arms, 129 U. S. 512; Donnell *v.* Insurance Co., 2 Sum. 371; Richards *v.* Todd, 127 Mass. 172.

In the present case we cannot say that the circuit court obviously erred in assessing the rental value of the property. The question was one with respect to which different minds might well entertain different views, and the testimony with respect to the rental value was conflicting. The conclusion reached by the circuit court is not in itself unreasonable and is not clearly in conflict with the preponderance of evidence. It must therefore be allowed to stand.

The decree of the circuit court is hereby affirmed.

Filed May 6, 1895.

64 And on the sixth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is a decree in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *May* 6, 1895.

G. G. LATTA, Executor of the Estate of William H. Gaines, Deceased; Albert B. Gaines, as Executor of the Last Will and Testament of Maria Gaines, Deceased; William H. Gaines, Jr., Fannie G. Williamson, Louisa Blasdell, Augusta Stitt, Mary P. Gaines, and Abner B. Gaines, Appellants,
vs.
VINA GRANGER, Appellee.
} No. 446.

Appeal from the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Vina Granger recover against G. G. Latta, executor of the estate of William H. Gaines, deceased; Albert B. Gaines, as executor of the last will and testament of Maria Gaines, deceased; William H. Gaines, Jr., Fannie G. Williamson, Louisa Blasdell, Augusta Stitt, Mary P. Gaines, and Abner B. Gaines the sum of twenty dollars for her costs herein.

May 6, 1895.

And on the eleventh day of May, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a petition for order to fix amount of supersedeas bond in words and figures following, to wit:

United States Circuit Court of Appeals for the Eighth Circuit.

65 G. G. LATTA, Executor, *et al.*, Plaintiffs, } No. 446.
vs.
VINA GRANGER, Defendant.

Comes the said plaintiff and prays the court to fix the amount of an appeal and supersedeas bond herein.

U. M. ROSE,
W. E. HEMINGWAY,
G. B. ROSE,
For Plaintiffs.

MEM.—The penalty should be but little more than the interest on the debt, pending the appeal, the land, of course, being a sufficient security for the debt.

Wilmer *v.* Railway Co., 2 Woods, 147.

Respectfully, ROSE, HEMINGWAY & ROSE.

Endorsed: "446. G. G. Latta, executor, *et al. vs.* Vina Granger. Petition to fix amount of supersedeas bond. Filed May 11, 1895. John D. Jordan, clerk. Rose, Hemingway & Rose."

And on the twentieth day of May, A. D. 1895, in the record of the proceedings of said circuit court of appeals is an order fixing amount of supersedeas bond in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1895.

MONDAY, *May* 20, 1895.

G. G. LATTA, Executor, etc., *et al.*, Appellants, } No. 446.
vs.
VINA GRANGER, Appellee.

Appeal from the circuit court of the United States for the eastern district of Arkansas.

On consideration of the petition filed by Messrs. Rose, Hemingway & Rose, counsel for appellants, it is now here ordered by this court that the penalty of the bond to operate as a supersedeas of the decree of this court affirming the decree of the circuit court be, and is hereby, fixed at the sum of three thousand five hundred dollars, with sureties to be approved by this court or one of the judges thereof.

May 20, 1895.

66 And on the twenty-second day of June, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a petition for appeal and assignment of errors in words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Circuit, May Term, 1895.

G. G. LATTA, Executor, *et al.*, Plaintiffs,
vs.
VINA GRANGER, Defendant.
No. 446.

Petition for Appeal and Assignment of Errors.

Come the said plaintiffs and pray an appeal from the final decree rendered in this cause by this court at the present term thereof to the Supreme Court of the United States, and they assign the following errors which were committed in rendering said decree, for the correction of which this appeal is prayed, for which errors said decree should be set aside and reversed:

Assignment of Errors.

1. This court erred in holding that the allowance to plaintiffs for rents of the land in controversy made in the decree of the court of first instance was sufficient in law and in equity.
2. The court erred in holding that the rents of said land should not be computed in accordance with the terms of the lease granted by William H. Gaines under which the defendants hold as shown by the pleadings and evidence in this cause.

U. M. ROSE,
G. B. ROSE,
For Plaintiffs.

Endorsed: "446. G. G. Latta, executor, &c., *et al. vs.* Vina Granger. Petition for appeal and assignment of errors. Filed June 22, 1895. John D. Jordan, clerk."

67 And on the twenty-second day of June, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals a supersedeas bond in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

GEORGE G. LATTA, as Executor of the Last Will and Testament of William H. Gaines, Deceased; Albert Gaines, as Executor of the Last Will and Testament of Maria Gaines, Deceased; William H. Gaines, Jr., *William H. Gaines, Jr.*, Fannie G. Williamson, Louisa Blasdell, Augusta Stitt, Mary P. Gaines, and Abner Gaines, Appellants,
vs.
VINA GRANGER, Appellee.

Know all men by these presents that we, the appellants above named, as principals, and U. M. Rose and G. B. Rose, sureties, are held and firmly bound unto said appellee in the just and full sum of thirty-five hundred dollars, to be paid to the said appellee, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of June, in the year of our Lord one thousand eight hundred and ninety-five.

The condition of this obligation is such that lately, at the May term of said United States circuit court of appeals, in a suit depending in said court between said appellants and said appellee, a decree was rendered against said appellants and in favor of said appellee, and said appellants are about to pray and prosecute an appeal from said decree so rendered by said United States circuit court of appeals to the Supreme Court of the United States to reverse said decree.

Now, the condition of the above obligation is such that if the said above-named appellants shall prosecute said appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue. 68

Sealed and delivered in presence of—

U. M. ROSE. [SEAL.]
G. B. ROSE. [SEAL.]

Approved by—
A. M. THAYER,
U. S. Circuit Judge.

UNITED STATES OF AMERICA, State of Arkansas, County of Pulaski, } *ss*:

On this day came before me, a notary public in and for said county and State, U. M. Rose and G. B. Rose, subscribing the above obligation, and each made oath that after payment of all his debts and setting aside all property exempt from execution he is worth the sum of ten thousand dollars.

U. M. ROSE.
G. B. ROSE.

Sworn to and subscribed before me this day.

Witness my hand and official seal this 13th day of June, 1895.

[SEAL.] JOHN BARROW,
Notary Public.

Com. exp. April 12, 1899.

Endorsed: "446. G. G. Latta, executor, *et al. vs.* Vina Granger. Appeal bond. Filed June 22, 1895. John D. Jordan, clerk."

And on the twenty-second day of June, A. D. 1895, there was filed in the clerk's office of said circuit court of appeals an order allowing appeal in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

G. G. LATTA, Executor of Estate of William H. Gaines, Deceased, *et al.*, Appellants,
vs. } No. 446.
VINA GRANGER, Appellee.

69 Appeal from the circuit court of the United States for the eastern district of Arkansas.

On motion of Mr. U. M. Rose, counsel for appellants, it is ordered that an appeal from the decree of this court to the Supreme Court of the United States in this cause be, and the same is hereby, allowed.

It is further ordered that the bond in the sum of three thousand five hundred dollars be, and the same is hereby, approved as a supersedeas.

St. Louis, Missouri, June 22, 1895.

A. M. THAYER,
U. S. Circuit Judge.

Endorsed: "No. 446. G. G. Latta, executor, &c., *et al.*, appellants, *vs.* Vina Granger. Order allowing appeal. Filed June 22, 1895. John D. Jordan, clerk."

And on the twenty-fifth day of June, A. D. 1895, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with acknowledgment of service endorsed thereon, is hereto attached and herewith returned:

70 The United States of America to Vina Granger, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, thirty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein G. G. Latta, executor of the estate of William H. Gaines, deceased; Albert B. Gaines, as executor of the last will and testament of Maria Gaines, deceased; William H. Gaines, Jr., Fannie G. Williamson, Louisa Blasdell, Augusta Stitt, Mary P. Gaines, and Abner B. Gaines are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Amos M. Thayer, judge of the United States circuit court of appeals for the eighth circuit, this twenty-second day of June, in the year of our Lord one thousand eight hundred and ninety-five.

A. M. THAYER,
United States Circuit Judge for the Eighth Circuit.

[Endorsed:] No. 446. Supreme Court of the United States. G. G. Latta, executor, &c., *et al.*, appellants, *vs.* Vina Granger. Citation. Filed Jun- 25, 1895. John D. Jordan, clerk.

Service acknowledged June 24, 1895.

JOHN McCLURE,
For Granger.

71 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, do hereby certify that the foregoing seventy pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of G. G. Latta, executor of the estate of William H. Gaines, deceased, *et al.*, appellants, *vs.* Vina Granger, appellee, #446, May term, 1895, as the same remain upon the files and records of said United States circuit court of appeals.

I further certify that the original citation in said cause is hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 11th day of July, A. D. 1895.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

72 In the Supreme Court of the United States, October Term, 1896.

GEORGE G. LATTA, Executor, *et al.*, Appellants,
v.
VINA GRANGER, Appellee.
No. 303.

It is hereby stipulated that the transcript shall be printed in this case, and that the other cases on the docket, as follows:

G. G. Latta, executor, *et al. v.* Neubert, No. 304;
G. G. Latta, executor, *et al. v.* Cohn, No. 326;
G. G. Latta, executor, *et al. v.* D. C. Rugg, No. 327;
G. G. Latta, executor, *et al. v.* A. S. Garnett, No. 328;
G. G. Latta, executor, *et al. v.* J. J. Sumpter, No. 329,

shall abide the decision to be made in this case.

Nov. 4, 1896.

U. M. ROSE,
For Appellants.
JOHN McCLURE,
For Def'ts.

73 [Endorsed :] Case No. 15,954, &c. Supreme Court U. S., October term, 1896. Term No., 303, &c. G. G. Latta, ex'c'r, &c., *et al.*, app'ts, *vs.* Vina Granger. Stipulation to print transcript of record in this case; cases Nos. 304, Latta *v.* Neubert; 326, Latta *v.* Cohn; 327, Latta *v.* Rugg; 328, Latta *v.* Garnett, & 329, Latta *v.* Sumpter, to abide the decision herein. Filed Nov. 6, 1896.

Endorsed on cover: Case No. 15,954. U. S. circuit court of appeals, eighth circuit. Term No., 303. G. G. Latta, executor of the estate of William H. Gaines, deceased, *et al.*, appellants, *vs.* Vina Granger. Filed July 22, 1895.

Office Supreme Court, U. S.
FILED
MAR 26 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

G. G. LATTA, Executor of the Estate of William H. Gaines, Deceased, et al., *Appellants*,

v.

No. 303.

VINA GRANGER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Abstract and Brief for Appellants.

U. M. Rose,
W. E. Hemingway,
G. B. Rose,
For Appellants.

ARK. DEMOCRAT CO., LITTLE ROCK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

G. G. LATTA, EXECUTOR OF THE ESTATE OF WILLIAM H. GAINES, DECEASED, ET AL., *Appellants*,

v. **No. 303.**

VINA GRANGER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Abstract and Brief for Appellants.

ABSTRACT.

On the 23d day of May, 1884, William H. Gaines and Maria, his wife, brought their bill on the chancery side of the court below against Perry Huff, Eva M. James, and Vina Granger, alleging that the plaintiffs, Albert Belding, Henry Belding and George Belding had (all except W. H. Gaines), being the sole heirs of Ludovicus Belding, deceased, been in the possession of certain lands in Hot Springs, first settled by said Ludovicus Belding, who claimed the same under the preëmption laws of the United States; that the plaintiffs continued in such possession for about twenty years until the 24th day of April, 1876, during which time they built houses and fences on the land, and made other improvements on it. That on the 26th of June, 1875, said William H. Gaines, being authorized by said heirs, leased the lot now known as lot 16 in block 68, being a part of said lands, to said Huff for the term of one year from that date, the lease to be renewed from year to year at the election of the lessee until the title to said land should be settled, at the annual rent of $160 per annum. That said lessee entered into possession of said lot solely under said lease, and that he and his assigns occupied it under said lease until the 1st day of June, 1876, at which time the United States dispossessed all parties, and assumed possession thereof, at which time the said lessee and his assigns owed plaintiff for rent on said lot, $84.62. That said lease provided that the lessee might remove all buildings and improvements placed by him on said lot during the continuance of said lease, or within thirty days after its expiration, on payment of all rents that might be due; but that, having failed to pay said rent, the building and improvements placed by them on said lot became the property of the lessor. That on the 17th day of March, 1880, said Huff assigned said lease to Eva James and Vina Granger, they well knowing the terms and conditions of the lease, and that the lessee had acquired possession under it solely. That on the 1st of June, 1860, Albert, Henry and George Belding conveyed a part of their interest in said land to the plaintiff, William H. Gaines, and that in 1887 they conveyed to him their remaining interest in the same.

That in less than six calendar months after the sitting of the Hot Springs Commission, created by act of Congress of March 3, 1877, entitled "An Act in Relation to the Hot Springs Reservation in the State of Arkansas," plaintiffs filed their claim before it, praying that they might be allowed to purchase said lot; and that said Huff filed a like petition in his own behalf; that said petitions were consolidated for the purpose of a hearing; that each party took testimony which clearly showed the facts above stated; but that the Commission misconstrued the law arising on this state of facts, and awarded the right to purchase to the said Huff, whereas the right to purchase should have been awarded to the plaintiffs; that under said award Huff had purchased said lot, and had received a patent therefor from the United States. Plaintiffs offered to repay the said defendants the purchase money paid for the lot, and all other sums that might be equitably due. They prayed for an account, that defendants might be construed to hold the legal title in trust for them, and to convey the same to them; and for all other proper relief (Tr., 1-4).

The defendant Granger answered, denying the title of the plaintiffs, but not the facts charged as to the lease (4). She also filed a demurrer (9).

Replication having been filed, the cause was set down for hearing. On the 2d day of March, 1887, it came on for hearing, and the court decreed that the title was in the plaintiffs; and reference was had to a master to ascertain the value of the rents and improvements.

Before the master, **A. B. Gaines** testified that the rents were worth with the improvements $100 per month, and without them $15 a year per front foot. The lot is 16 feet in width (4).

John D. Ware testified that the lot was worth $50 a month with the improvements, and $15 a month without them (13).

O. F. Smith testified that with the improvements, the rents were worth $300 per annum at least, and without the improvements about $5 per annuum per front foot (14).

By a final decree, rendered November 10, 1887, the master's report was confirmed, the court finding that the rental value of the property amounted to $1,834.50 (15).

The defendant appealed to the Supreme Court of the United States. Pending the appeal, the death of Maria Gaines was suggested, and the cause was revived in the name of Albert B. Gaines, as her executor. William H. Gaines having since died the suit has been revived in the name of Latta, as his executor. The judgment was reversed as to rents and improvements, and affirmed as to the title of the land; and the cause was directed to proceed in accordance with the opinion delivered by the court (17). See opinion in Goode *v.* Gaines, 145 U. S., 141.

On the 3d day of April, 1893, the cause came on for hearing the second time, and the matter as to rents was referred again to a special master (17).

The evidence as to the rents taken before the master for the plaintiffs, is as follows:

Ed. Hogaboom testified as follows (28):

It is difficult to say what the annual rent would be worth unless the tenant had a fixed time during which he could hold. If there were no improvements on the property the rents would be nominal, not more than $10 a month, if they were rented by the year, without improvements; on a lease for nine years, the property, exclusive of improvements, would be worth about $3 per front foot. If the tenant was to be paid for his improvements at the end of the lease, it would make a difference of $2 per front foot. If the landlord was to take the buildings and pay for them at the end of the term, I should say that the rent would be worth $2 per foot per month, or $24 a year. If it had been offered on a lease of nine years in May, 1884, it would have been worth about $1 per front foot per month. If the property were rented for five years, no one would take it if they lost the improvements at the end of the time. If the property were in the hands of a receiver pending litigation, which might end at any time, I would put the rental value at 37½ cents per foot for each year. There has been an increase in the value of rents since May, 1884, but not during the last three years.

A. B. Gaines testified as follows (24):

I should estimate the value of the rents of the lot in controversy at $10 per front foot per annum, from month to month or from year to year, without improvements.. If you base the rents on what the lots would sell for, it would be more than that. The value of rents has increased since May, 1884, and would be greater than they were nine years prior to that time.

J. B. Mellard testified as follows (29):

I think that the rent on this lot would be worth $3, or $5, or $6 per foot per annum if rented now, but if some years ago it would be less. I mean with the improvements now on the lots, they to be paid for now, and no rent being charged for the improvements.

George W. Baxter testified as follows (27):

The lot is within the fire limits, and only a brick house could be put on it. If the landlord at the end of that time would not take the buildings, I don't think the property could have been leased. I don't think the value of rents has been greatly increased since 1884. If the property was in litigation, and the term was to close at the end of the suit, it would be doubtful if any rent could be obtained from year to year. The rent would have been nominal. Supposing the property to have been in the possession of the tenants since May, 1884, I cannot say what the rents would be worth. It would not have brought any rent without improvements.

John D. Ware testified as follows (29):

The lot would be worth $250 per front foot, and the rent worth 6 per cent per annum on that valuation. I mean without any improvements for the year 1884, and so on down until now on a contract for ten years. If the term was to end at the close of any pending suit, I cannot say what the rent would be worth. It would be difficult to rent the lot at all. In estimating the rent I have supposed there was the usual provision in the lease by which the party putting up the building gets something for it. Without such a provision, the rental value would be about 4 per cent on the value of the property. The rent would be worth more now than it was before May, 1884. The longer the term the higher the rent would be. The rental value to the defendants has been what they could have realized from it, and would be about 6 per cent on the valuation of $250 per foot, which I estimate as the value of the lot. I mean the rent of the naked ground.

Alf. Whittington testified as follows (33):

A piece of property like that in controversy in this suit would rent from 1887 to 1888, worth $8,000, for $800 per annum. I leased a lot on these terms, situated very near the one in controversy, for five years, and I think the rent was fair. If a building had been put on the lot that I leased, costing $1,800, I should think that it ought to bring $1,800 a year. If the property had no improvements on it, and was to be surrendered at the end of a suit which might terminate at any time, it would possess no rental value.

The following witnesses testified for the defendants:

D. C. Rugg testified as follows (38):

If the property in controversy had been rented during the pendency of a suit which might terminate at any time, the rent would be merely nominal.

Lucien Farmer testified as follows (41):

On a one year's lease, with no provision for payment for improvements at the end of the term, the rental would not exceed $1 or $2 per front foot a year. But the testimony of this witness has no reference to this lot. The plaintiffs proposed to examine the witness as to lots in block 68, but on motion of the defendant the question was ruled out (Tr., 47).

The defendant **Granger** testified in the cause, but not before the master, as follows (46):

I paid the grantor, Perry Huff, at the date of said conveyance, $2,650 cash. I knew of no claim made by plaintiffs at the time I bought. I had never interrogated either of the plaintiffs as to whether they had any claim to it or not. I have been in possession of the property ever since my said purchase from Perry Huff. I knew nothing of any relation of landlord between Perry Huff and plaintiffs when I purchased. I did not know how Mr. Perry Huff acquired possession. I did not know anything about his acquiring possession. I took his warranty deed, and did not look any further. He was in possession. I leased part of Major Gaines at what is now Bridge street and Central avenue. I don't know whether the Perry Huff property belonged to Gaines or Belding, or either of them. I knew the part we were on was in contest, but the other I did not. I made no effort to find out whether it was in contest or not. I don't know whether the purchase money to the government was payable or not when I purchased.

It was agreed that the defendants had retained possession of the property from the time of the commencement of the suit up to the time that the testimony was taken (42).

The master reported the following state of accounts:

The defendant is entitled to the following credits:

Paid government	$ 160.00	
Interest	108 40	
Value of improvements—building	2,500.00	
Value of plumbing	125.00	
State and county taxes	512.00	
Interest	109 80	
Sewer tax	83.00	
Interest three years	7.74	
Total		$3,605.94

Debits:

Rent from May 23, 1884, to April 24, 1893, at 50c per front foot per month	$1,014.07	
Interest to April 28, 1893	275.64	1,289.71
Balance due Mrs. Granger		$2,316.23

(Tr., 42).

The plaintiffs filed exceptions to the report on several grounds, one was to the effect that the allowance for rents was grossly inadequate (43).

On a final hearing the exceptions were overruled.

The plaintiffs prayed an appeal.

ASSIGNMENT OF ERRORS.

The court below erred

1. In refusing to allow the appellants the amount of rents specified in the lease under which appellee holds.

2. In allowing appellee $2,500, and an additional sum of $125, for improvements.

3. In allowing the appellant only $1,014.07 for rents, said sum being grossly inadequate.

4. The report of the master last filed could not form a valid foundation for any modification of the decree of November 10, 1887; and so far as the decree appealed from is based on that report it is necessarily erroneous.

5. Because the circuit court failed to render a decree in favor of appellants for double damages, as required by statute.

BRIEF.

I.

We beg leave to refer to the following authorities as shedding light on the subject.

"The principle originates in the relation between lessor and lessee, and so far as respects them is well established, *and ought to be maintained.* The title of the lessee is in fact the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself; and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor without disparaging his own; and he cannot set up the title of another without violating that contract by which he obtained and holds possession, and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation."

C. J. Marshall in Blight *v.* Rochester, 7 Wheat., 547.

"If he (the landlord) sues within the period of limitations *he must recover;* if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and lapse of time."

Willison *v.* Watkins, 3 Pet., 49.

"If premises are rented for a series of years at a stipulated rent per year, and no provision for reduction in case of the destruction or injury of the buildings by fire be inserted in the lease, the rent is payable for the entire term, and until the premises are returned; and this though the buildings may be injured, or even destroyed by fire. In short, a demise is not ended until the property is returned to the owner; and, so long as the demise continues rent is payable at the stipulated price, unless there be some provision for a reduction."

Mr. J. Brewer in U. S. *v*. Shea, 152 U. S., 189.

"Parties succeeding by operation of law, or by conveyance, to the possession of such claimants and occupants, would succeed also to their rights. But lessees under a claimant or occupant, holding the property for him, and bound by their stipulation to surrender it on the termination of their lease, stand in no position to claim an adverse and paramount right of purchase. Their possession is in law his possession. The contract of lease implies not only a recognition of his title, but a promise to surrender the possession to him on the termination of the lease. They, therefore, whilst retaining possession, are estopped to deny his rights. The rule extends to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law or by purchase and assignment."

Mr. J. Field in Rector *v*. Gibbon, 111 U. S., 284.

"At the end of the term it became the duty of the tenant to vacate the premises. If he failed to do so, and held over without making a new arrangement, the landlord had the election to treat the continuing occupant as a tenant for another year on the same terms and conditions as were agreed on in the express contract for the previous term."

Rhodes Furniture Co. *v*. Weedon (Ala.), 19 So. R., 319.

"He (the tenant) cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination by the lapse of time, or demand of posession."

Willison *v.* Watkins, 3 Pet., 48.

These propositions of law need only to be stated. They are elementary; yes, sub-elementary, subliminal. They govern every case of tenancy existing wherever the English language is spoken.

So far as we have been able to discover, there is no power in a court of chancery to dispense with these rules in any case whatever. They are as binding on that court as they are on the parties.

"*The same principles* which would prevent a tenant from contesting his landlord's title in a court of law *would apply with greater force in a court of equity.*"

Willison *v.* Watkins, 3 Pet., 48.

It may be conceded that there was a time when the power of the chancellor was so ill defined that it might be said to have no other limits than his discretion; but that time is long past. It had come to an end as long ago as the time of Lord Chancellor Talbot, who said:

"There are instances indeed in which a court of equity gives a remedy where the law gives none; but where a particular remedy is given by the law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and to extend it further than the law allows."

Heard *v.* Stamford, Cas. Temp. Talbot, 173.

Mr. Pomeroy says that if any other rule should prevail "it would soon destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his judicial rights."

1 Pom. Eq., sec. 43.

"A court of equity cannot, by avowing that there is a right, but no remedy known to the law, create a remedy in violation of law, or even without the authority of law."

Rees *v.* Watertown, 19 Wall, 122.

"Wherever the rights or the situation of the parties are clearly defined and established by law, equity has no power to change or unsettle those rights, or that situation; but in all such instances the maxim *equitas sequitur legem* is strictly applicable."

Magniac *v.* Thompson, 15 How., 299.

Judge Story said:

"If indeed a court of equity in England did possess the unbounded jurisdiction which has thus been generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, *it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power that could well be devised.*"

1 Eq. Jur., sec. 19.

We should come in short to the chancellor's foot; an uncertain measure at best, and one that might vary in different cases.

To prevent such alarming results appellate courts are established.

The courts cannot, under the guise of "doing equity," make contracts for parties.

Morgan Co. *v.* Allen, 103 U. S., 515.

In that case the court, by Mr. J. Harlan, said: "If, as urged that the result is unfortunate for the county, we can only say, *what cannot be too often repeated*, that hard cases cannot be permitted to make hard law."

But this is not a hard case. It has not even that poor excuse. The tenants went into possession as tenants, in violation of a plain duty, as held by this court, and afterwards denied the title under which they received that possession. There is not a single element to differentiate this case from hundreds of cases where leases have been enforced strictly according to the agreements which the parties made of their own free will. Such cases are occurring every day; and no one ever intimates that the courts possess any dispensing power to bind or loose as they see fit. It is true that in this case the parties recognized the fact that the title of the landlord might be open to doubt or contention; but the principle in question does not depend in any degree on the goodness of the title of the landlord. No doubt the tenants in these cases when they disclaimed thought that they had a good thing of it. Unquestionably all other disclaiming tenants think the same thing; otherwise they would not disclaim. The principle that the tenant cannot dispute the title of the landlord is not an equitable estoppel; it is an estoppel by contract.

It has now been more than once adjudicated by this court that the tenants in these cases have violated their contracts. It is said that the way of the transgressor is hard. Let us see how it has turned out in these cases.

A tenant who has denied the tenancy cannot shift his ground, and set up a claim for improvements.

Reed *v.* Reed, 1 Am. L. J., 263.

This because he cannot occupy inconsistent positions.

Railway Co. *v.* McCarthy, 96 U. S., 258.

However the defendants have been allowed the full value of all improvements. But it must be added that the plaintiffs have never manifested any unwillingness to pay the value of the improvements. So that may pass.

As far as this was a suit for rents it was the same thing as a suit on a promissory note, the annual rents having been fixed by a valid legal agreement which has never been questioned. No part of the demand was barred by limitation; nor was there any specific prejudice shown consequent upon any action of the plaintiffs on which the doctrine of laches might be applied.

Goode *v.* Gaines, 145 U. S., 155.

Nevertheless the plaintiffs were denied any recovery for rents accrued before the date of the commencement of the suits, making a clear gain to the defendant in this suit of $814.12 (See first decree Tr., p. 15).

The amount of rent due on the lease at the time of the last decree was $1,602.39. The master however, paying no attention to such a small matter as a contract, allowed for rent $1,014.07 (Tr., 43), making a difference of $508.32. The discrepancy in some, if not all, of the other cases is much greater. But the principle is the same in all.

If it shall turn out that the law is that tenants can make a profit by violating their contracts, no doubt there will be some that will not be unwilling to take advantage of the privilege; and there will be others that will regret that they did not know the law on this subject at an earlier date.

The circuit court as constituted when the last decree was rendered was decidedly of the opinion that the plaintiffs had no rights that any one was bound to respect. When, after a long and expensive litigation, the decree of that court in this case was affirmed in everything except as to one item in the account of the master, the circuit court refused to allow a final decree to be entered until compelled by mandamus issued from this court.

Gaines *v.* Rugg, 148 U. S., 228.

After the decree got itself on record the court displaced the master who had been appointed in the cases, and another was appointed in his stead, with results displayed by the record.

In the circuit court of appeals several reasons were offered by counsel for appellee why the decree should stand; and these we will enumerate.

"1. The prayer of the bill is that the plaintiffs 'be allowed reasonable rents for the occupancy of said premises.' "

This is a quibble. Whatever the law prescribes is reasonable. When the defendant in chancery prays that he "may be dismissed with reasonable costs," he does not mean that the court must fix the amount of the costs without regard to laws. The fact that items of cost are usually fixed by statute does not prevent them from being reasonable costs. Indeed it is the highest evidence that they are reasonable. The office of a prayer in a bill is to set forth the measure of relief to which the plaintiff deems himself entitled; and not to indicate the evidence upon which his rights are based.

2. The reference to the master directed him to proceed to state an account between said parties according to the terms of the decree.

Yes; and the decree followed the mandate in Goode *v.* Gaines, wherein the court said "appellants should be charged with *rental value* from the date of the filing of the bill to the rendition of the decrees, with interest."

This does not prescribe the manner in which the rental value should be ascertained. The court of appeals seem to have regarded the expression *rental value* as being ambiguous. It has never seemed to us to be so in the least. When you speak of the value of a policy of insurance you express a definite idea, though you may not say how that value is to be ascertained. If the policy is a valued policy it goes without saying that the value is fixed by the agreement of the parties. If the policy is an open one, it will at once be obvious that extrinsic evidence of value will be admissible.

This court did not direct the manner in which the rental value should be ascertained; nor would it probably have done so in the case of a valued policy of insurance. There are some things in the law that may be taken for granted as being matters of common knowledge in the profession.

If this court had said that the rental value must be ascertained by extrinsic evidence, then the opinion of the court below would have had something to rest on; but nothing of that sort was intimated.

The court below say: "If the (supreme) court had intended that the rents should have been computed at the rate fixed in the lease, and that the lease should control in éstimating rental value, it is obvious that the clause above quoted would have been entirely unnecessary" (Tr., 54).

We confess that this is more than we can understand. If this court had said nothing about the rents, one side of the account would have been omitted; that is all. It will be noticed that the court below do not suggest that it ever could be held on any legal principle heretofore known that the rent fixed in the lease should not control (unless the landlord should elect to proceed against the tenant as a trespasser). Why, if the expression was ambiguous—which it certainly was not in the view of the state of the record—the court below should have interpreted it as meaning something against the law instead of being in accord with it, is a question that is very dark indeed.

The court add: "We think therefore that the decision directed the circuit court in effect to ascertain the *fair rental value*, without reference to the rent reserved in the original lease."

But the fair rental value is what the parties have agreed on. If this court meant anything else certainly no such intimation was given. What is the "fair rental value?" Is it anything different from what the parties have deliberately agreed on? Evidence of fraud, duress, mistake, there is none. It would require very strong evidence to convince us that this court intended to set aside a contract the validity of which has been adjudicated by this same court, and to substitute another of its own making.

3. It was said that the exception to the report of the master to the effect that the allowance for rents was inadequate (Tr., 43), did not raise the question that the master should have taken the lease for a guide in fixing the rents.

This is another quibble that is of no importance; and the court below disregarded it. The error is a vital one on the face of the record, and would invalidate the decree if there had been no exception at all. The exception was properly drawn so as to raise the point as to the value of the rents in every aspect that might be presented. As the lease was a part of the record, the decree must be reversed, even if no exceptions whatever had been filed. The fact that the master had indicated a decree which the lease, that was the foundation of the suit, showed to be improper, would not justify such a decree.

Himely *v.* Rose, 5 Cranch, 313.
The Santa Maria, 10 Wheat., 446.
Bogert *v.* Furman, 10 Paige, 496.

It was not necessary to make of the exception a brief of the case, or to make the exception state the law in every possible phase. In courts of law, where technical rules more extensively prevail, a motion for a new trial on the ground that the damages are excessive, or are inadequate, never goes into details of law or of fact. The mere statement that the damages are too much or too little brings the question before the court for reveiw.

It is plain to be seen from the opinion of the court below, that that court thought that the rents allowed by the master were inadequate as shown by the testimony. The opinion also shows that the court considered that the matter had been properly brought to the notice of the circuit court; and the conclusion is stated as being based partly on that fact. The court said · "Where the *trial court* has considered conflicting evidence, and made its finding thereon," etc.

When these cases were here before they were reversed on the ground that no rents should be charged for any time prior to the commencement of the suit; and yet that objection was not made in the exceptions to the reports of the master specifically. (See former transcript in Rugg *v.* Gaines, p. 26.) In *Neubert v. Gaines* the transcript showed no exceptions at all (p. 26). In *Sumpter v. Gaines* the exceptions showed no specific ojection to the item of rents accrued before suit brought (p. 21). In *Smith v. Gaines* there were no exceptions. So in *Cohn v. Gaines.* In *Allen v. Gaines* the exception was only as to interest on accrued rents (p. 28). In *Madison v. Gaines* the exception was that the rents allowed were "speculative and exorbitant" (p. 34).

So in *Rugg v. Gaines*, the exception was that the allowance for rents exceeded the contract price as shown by the lease (p. 27). In this case the exceptions were that the rents were exorbitant and speculative, and that no rent was demanded before suit brought (Former transcript, p. 34). But all the decrees were reversed, not, of course, on the exceptions; but because the decrees proceeded on a false theory; and because the reports of the master, whatever they may have been, could not justify decrees which were made on erroneous principles of law.

Goddard *v.* Foster, 1 Black, 506.

Fidelity Co. *v.* Shenandoah Co., 42 Fed. R., 373.

Now as to the exceptions made to the last report of the master again. The exception to the amount of rent allowed did not rest alone on the objection that the lease furnished the only proper guide for a computation of the rents. Leaving that proposition out of view, the amount allowed for rents was clearly too small. Let us consider how the matter would stand if this had been a suit for use and occupation.

In that action the lease would be admissible in order to show the amount of rents recoverable, even though it might be void under the statute of frauds.

Taylor Landlord and Tenant, sec. 650.
Abbott Trial Ev., p 352.

If the lease were the only evidence, it would, of course, be conclusive. There is not a syllable of testimony in this record to indicate that the amount of rent reserved was unjust, unfair or oppressive. All of the witnesses who speak of the matter say that the rental value was less when the lease was made than afterwards. See testimony of Hogaboom, pages 21, 23, Gaines, page 25. It will be noticed that some of the evidence relates to other lots.

The lot in this case is 16 in block 68 (Tr., 2); and it is 16 feet wide (Id., 4). The rent reserved was $160 a year (Id.).

The master on the first reference found that the rental value, *without improvements*, was $10 a front foot (12). The value of the improvements was fixed at $1,800. It could not be said that this finding was unreasonable. It cannot be said now that it is unfair or improper. It was approved by the circuit court nine years and a half ago (Tr., 14). Except as to the rents accruing before the commencement of this suit the report was approved by this court five years ago.

Goode *v.* Gaines, 145 U. S., 141.

With the view that we take of the matter it would be useless to examine the testimony taken before the master on the second reference. We only submit that if that testimony was admissible for any purpose, it shows, when taken in connection with the testimony taken on the first reference, that the master's estimate of rents on the second reference was much too low.

The presumption in favor of the correctness of the finding of a master has never been extended so as to cover palpable errors. When these cases were here before, this court did not regard the report of the master as being inviolably sacred.

There was not the slightest conflict between the testimony on the part of the plaintiffs and that on the part of the defendant; because the witnesses for the defendant testified on the theory that, owing to the pending litigation and consequent uncertainty of tenure, the rents should be only nominal. That a tenant can unlawfully deny the title of his landlord, and so bring about a lawsuit, and then have the rents reduced or canceled because he does not know how long he can keep the case in court, is a proposition that certainly has the merit of novelty. A good way to end that uncertainty would have been for the tenants to surrender the property to the landlord.

It is certainly true that whether we go by the contract price, or by the *quantum meruit* the last report of the master was palpably erroneous.

We do not see what the decision in Rector *v.* Lawrence, 137 U. S. 139, has to do with this case. There the defendant had rented out the lots; and he was charged with actual receipts. Here the defendant occupied the land, and there is no evidence of actual receipts.

II.

We have so far considered the case in the aspect in which it was treated in the circuit court of appeals. We have endeavored to show that, looking at the matter in that phase alone, the decree should be reversed.

There are other considerations, however, which are paramount, and which show conclusively that the decree must be reversed.

This suit was brought May 23, 1884 (Tr. 4). Interlocutory decree was rendered March 2, 1887, and Cox was appointed master to take an account of rents, taxes, and amount of improvements (11). The master took testimony according to the decree, and filed his report April 9, 1887 (12).

The master found the amount of the rents *without improvements* to be $1,850.04, and that the then present value of the improvements was $1,800 (12).

Defendant's exceptions to the report were overruled November 10, 1887 (14); and the court found that the amount of the rents accrued prior to the commencement of the suit was $814.12, leaving the subsequent rental value $670.38. On the whole account the court rendered a decree in favor of the defendant for $555.12 (14).

Defendant appealed; and the appeal was disposed of in this court May 2, 1892. The mandate having been filed in the circuit court the judge of that court was of the opinion that the defendants were entitled to file new answers, pleas or demurrers, just as if the bill had been filed since the last rule day. (See response filed in Gaines *v.* Rugg, 148 U. S., 233.) This court thought otherwise, issued a mandamus, and compelled the entry of a final decree.

Mr. J. Blatchford, in delivering the opinion of the court, said:

"It is, we think, very plain that *so much of the decree* of the circuit court of November 11, 1887, *as was not disapproved by this court still stands in full force.*"

How much of that decree then was disapproved?

On the former appeal this court said:

"We are of opinion that the accounting between the parties should be stated, both as to debit and credit from the 23d of May, 1884, with the exception of the credit for the amounts paid to the government for the lots, of which payments we regard appellees as getting the entire benefit, and that no increased rent should be allowed on account of the improvements, as appellees are only to be held to their value *as of the date of the decrees.* In other words, appellants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest; and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amounts paid the government for the different parcels, with interest from the dates of payment, as well as with the value of the improvements in each instance at the time of the rendition of the decree."

As the decree of the circuit court as to rents was based on the ground rents alone, without regard to improvements of any kind, the order made here on appeal did not affect that item of the account.

What was settled then by the decree of November 10, 1887 (14)?

1. It was settled that the rents were to be computed according to the rate fixed in the lease. The decree appealed from says: "And thereupon the court finds and states the account between the plaintiffs and the defendants as follows: To amount due said plaintiffs for rent, *according to the terms of the lease.*"

2. That the value of the improvements at the date of the decree fixing the rights of the parties was $1,800.

The decree of this court only struck out of the account the single item of the rents accrued before the filing of the bill, the amount of which was shown by the decree below.

As the defendant did not surrender possession but took an appeal with supersedeas (see former transcript,

p. 132), of course the rents ran on at the rate specified in the decree.

In these respects the decree of November 10, 1887, "remains in full force," and cannot be changed now by this court, or by any other. It belongs to the irrevocable past.

After the mandamus was ordered the circuit court entered the decree as directed. A new master was appointed who was directed to "proceed to state an account between said parties according to the terms of this decree." Any competent master, with the record before him, could do that in five minutes or less time. But the master was directed "to take testimony in writing of all witnesses produced" and to report it to court (17). The object of such testimony was not stated.

We do not conceive that this order was improper, since there might have been a surrender, or some other act, performed after the decree of November 10, 1887, which would affect the final result.

In point of fact nothing of the sort was shown; but the master also seemed to think that, although only one item in the account was to be restated, it was necessary to begin at the very beginning, and take new proofs as to the value of the rents, and of the improvements. So he proceeded to do so. He fixed the value of the improvements at $2,625, and cut down the rents to one-half the amount fixed by the decree, which could not then have been changed even on a bill of review. Improvements made after the institution of this suit could not be allowed.

Jefferson *v.* Edrington, 53 Ark., 570.

But it was not shown that any of that sort had been made.

As the court could not change the effect of the former decree, neither could the master, or the master and the court combined do so.

"It is not within the province of a master to pass upon all the issues in an equity case; nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers."

Kimberly *v.* Arms, 129 U. S., 524.

That the master in this case had no power to go into the question of rents and improvements must be obvious.

Spicer *v.* James, 2 Mylne & Keen, 386.

"Where the master by his report states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding to except to the report, as that question decided by the master may be opened upon further directions without exceptions."

Von Tobel *v.* Ostrander, 42 N. E., 152; 158 Ill., 499.

2 Dan. Pl. & Pr., 1310, Perkins' Ed.

In Adams *v.* Claxton, 6 Ves., 230, the court said: "No exception is taken to the report; but the whole matter appears on the face of it; and therefore it is contended that it is open to inquire whether the master's conclusion is right; and I apprehend it is so open."

Monahan *v.* Fitzgerald, 62 Ill. App., 192.

Celluloid Co. *v.* Cellonite Co., 40 Fed. R., 476.

Where the master assigns reasons for his conclusions that are unsatisfactory no exception is necessary.

Hooks *v.* Sellers, 1 Dev. Chy., 61.

Jenkins *v.* Briant, 6 Sim., 603.

Brown *v.* De Tastet, Jac., 284.

Levert *v.* Redwood, 9 Port., 79.

White *v.* Johnson, 2 Munf., 285.

Bank *v.* Shirley, 26 W. Va., 563.

Consequa *v.* Fanning, 3 Johns. Chy., 593.

Even if the plaintiffs had waived the right to except to the report that would not have justified the court in revoking or modifying the decree rendered years before the appointment of the master.

Waterman *v.* Banks, 144 U. S., 407.

Though the decrees made by this court on the former appeals, seem to us to be as free from ambiguity as the ten commandments; yet as a construction which we believe to be erroneous has been placed on them, it is clear that this is the proper tribunal for the interpretation of its own records, if interpretation is necessary. An appeal in chancery is of course only a rehearing in a higher court.

Suppose that the case is reversed on the present appeal, shall we be required to have a new master, and a new ascertainment of the value of the rents and improvements? If so we have an endless chain, or a wheel which may revolve, it may be for years, it may be forever.

III.

If the report of the master last made was or could be the foundation of a proper decree, then the circuit court erred in not rendering a decree for double the amount of rents allowed, as required by express statute. The following is the Arkansas statute, enacted in 1838:

"If any tenant for life or years, or if any other person who may have come into possession of any lands and tenements, under or by collusion with such tenant, shall willfully hold over the same after the termination of such term, and thirty days previous notice in writing given requiring the possession thereof by the person entitled thereto, such person so holding over shall pay to the person so kept out of possession double the yearly rents of the lands or tenements so detained for all the time he shall keep the person entitled thereto out of possession."

Ark. Dig. St., 1894, sec. 4461.

Where the tenant disclaims the title of the landlord no notice to quit is necessary.

Woodward *v.* Brown, 13 Pet., 4.

Peyton *v.* Smith, 5 id., 491.

Respectfully,

U. M. Rose,
W. E. Hemingway,
G. B. Rose,
For Appellants.

Office Supreme Court, U. S.
FILED.
APR 28 1897
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

G. G. LATTA, Executor,
vs.
VINA GRANGER.
No. 303.

ADDITIONAL BRIEF FOR APPELLANT.

1. The master, in ascertaining the value of the rents, proceeded on a false theory. He assumed that the property was vacant, that the landlord was under no obligation to pay for any improvements the tenant might make, and that the tenant, holding by an uncertain tenure, could not afford to improve the property. But exactly the reverse was the case. The property was improved, and the landlord was bound to pay for the improvements. The question should have been, what would a tenant, who contemplated erecting improvements of this character, to be paid for by the landlord at the end of the lease, have given for this ground?

Upon that basis the evidence is as follows:

Hogaboom (Tr., 21) says $24 per annum per front foot; Gaines (Tr., 25), $10; Mellard (Tr., 26), over $10;

Average
$15.30

Baxter (Tr., 28), $10; Ware (Tr., 30), $15; Whittington (Tr., 33), $24; Farmer, for defendant (Tr., 41), ~~$12 to $24~~. did not testify on this hypothesis.

These are all of the witnesses except Rugg, one of the original defendants, who, after a violent tirade against Mr. Cox for fixing it at $10 per front foot, is compelled to admit (Tr., 40) that he is charging his own tenants $24 for like property. Yet the master allowed only $6.

2. These leases were made in 1875, when Hot Springs was a straggling village of wooden huts, the uncertainty of the title preventing the construction of any substantial improvements, and with a population of some 3,000; and yet the rents agreed upon are higher in every case than those allowed by the master for the years 1884 to 1893, the most prosperous in the existence of Hot Springs, and of the country, when it was a flourishing little city of over 10,000, upon whose improvement and embellishment the Government had expended large sums. As the value of rents is dependent on the law of supply and demand, that is sufficient to show the injustice of the master's findings.

3. It has been conceded throughout these cases that the tenants should pay no rents on the improvements erected by themselves. But how is their share of the rent of the improved property to be ascertained? We submit that it should be done by capitalizing the value of the land and of the improvements, and dividing the rents of the improved property between landlord and tenant according to the value of their respective holding. In this case Cox, the first master, found in accordance with the testimony, that the value of the rents on the property, as improved, was $600 per annum. The land was worth over twice as much as the improvements, and the share going to the landlord would, therefore, be $400 per annum, or $3,600 for the nine years.

This was evidently Mr. Justice Brewer's idea when he framed the decree for the first reference, for he fixed, for the master's guidance, the value of the land at $5,500. (Tr., 12.)

4. Upon the proposition that a tenant holding over against his landlord's consent can make no profit by his wrong, but must pay at least the stipulated rent, see—

2 Wood on Landlord & Tenant, Sec. 463;
Baker *v.* Root, 4 McLean, 572;
Ames *v.* Schuesler, 14 Ala., 600;
Evertson *v.* Sawyer, 2 Wend, 507.

Respectfully,

U. M. Rose,
G. B. Rose.

16-8

303

Court, U. S.
D.
APR 17 1897
H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

G. G. LATTA, Executor of Wm. H. Gaines,
Deceased, et al.,

v.

VINA GRANGER.

BRIEF FOR APPELLEE.

John McClure,
For Appellee.

ARK. DEMOCRAT CO., LITTLE ROCK.

IN THE

Supreme Court of the United States.

G. G. LATTA, EXECUTOR OF WM. H. GAINES,
DECEASED, ET AL.,

v.

VINA GRANGER.

BRIEF FOR APPELLEE.

Waiving the question, if it can be waived, as to whether this court has jurisdiction of this appeal, the amount in controversy being less than $5,000, and waiving the question, if it may be waived, as to whether the remedy of the plaintiffs, for the error complained of, is not by mandamus instead of appeal, and proceeding to the matters at issue, they may be resolved into two simple propositions.

1. *Whether an assignment of error, which was not submitted to, or passed upon by the court below, can be availed of in this court? and,*

2. *Whether the findings of a master, upon a question of fact, where the testimony is conflicting, will be sustained, where the preponderance of the testimony is in accord with the finding of the master?*

History of the case in relation to the matter of rents.

At the first hearing in circuit court the master, in the matter of rent, found as follows:

"First. That the rental value of lot 16, block 68, without improvements, to be $10 per foot front per annum; that the frontage of said lot is 21 feet 2 inches by 90 feet in depth, and the time to be seven years and four months from date of award to the first day of the April term, 1887, $1,554.66; interest on same six years and four months, $295.38; total, $1,850.04" (Rec., p. 12).

There was a lease in this case between the plaintiffs and one Huff for one year from the 1st of July, 1875, to July 1, 1876, to be renewed and extended from year to year, if the lessee shall so elect, until the title to the Hot Springs quarter section of land is settled (Rec., p. 5).

There was no pretense, when the matter was before the master the first time, that the rate fixed *in the lease* fixed a rule for the computation of rents.

The amount of rent found by the master passed into the decree, and an appeal was prosecuted to this court.

At the time of rendering the decree in the court below, the case of Lawrence *v.* Rector, 137 U. S., 139, which was a continuation of the Rector-Gibbon case in 111 U. S., 276, had not been decided, but by the time the case came on for hearing in this court, it had.

In that court, among other things, it was urged by the fifth assignment of error: "That the decree is erroneous in overruling the exceptions to the master's report on the matter of the rental value of the lots" (see brief before the supreme court, p. 2). And in the same brief this language was used:

"A decree is rendered against all the appellants for rent, and they are charged rent, for a vacant lot, at the rate of from $10 to $12.50 per foot front per annum for seven or eight years. These rents are excessive and extortionate; so much so that this court in Lawrence *v.* Rector, 137 U. S., 139, modified the decree, charging only the rent *received from the leased property*, by the appellant." * * * In the case alluded to, this court said: "The measure of liability is not the *rental value*, but the *actual receipts*." (See appellant's brief in supreme court, 83.)

The state of the record, as will be shown later on—want of proof—rendered it impracticable to follow the rule laid down in Lawrence-Rector case. Thereupon it reversed the case, instead of modifying the decree, as in the Lawrence-Rector case, and prescribed a different rule for ascertaining the rental value.

When the causes were remanded to the circuit court, the following decree was entered:

"It is now ordered, considered and decreed by the court, * * * that in stating said account said defendant be charged with the rental value of said lot from the 23d of May, 1884, or during such portion of said time as they may have kept said plaintiffs out of the possession thereof down to this date, with interest on the same from the end of each year at the rate of 6 per cent per annum, *no additional rent to be charged to said defendant by reason of any improvements placed on said lot by said defendant,*" etc.

Another master was appointed to state the account, who afterwards discharged that duty, and reported as follows :

Rent from May 23, 1884, to April 28, 1893, at 50 cents per foot front per month	$1,014.07
Interest to April 28, 1893	275.64
	$1,289.64

Exceptions were filed to this report by the appellants, as follows :

"1. He erred in allowing the defendant $2,500 for improvements.

"2. In allowing her $512 and interest for State and county taxes.

"4. In allowing her $83 and interest for sewer taxes.

"5. And in allowing the plaintiff only $1,014.07 for rents, said sum being grossly inadequate."

All of these exceptions were overruled and a decree was entered in accordance with the finding of the master. From this decree an appeal was taken to the circuit court of appeals.

It will be observed that in the *exceptions* to the master's report there is no exception which complains of the master *for not following the mandate of the court* or any direction contained in the order of reference as to the manner to be pursued in ascertaining the rental value, but only that the master erred *in allowing the plaintiffs only $1,014.07 for rents.*

Prayer of the bill.

The prayer of the complaint is, *not that Gaines be allowed the rate of rent prescribed in the lease*, but "that they be allowed *reasonable rents* for the occupancy of the said premises" (Rec., p. 4).

It is evident from this prayer the plaintiffs had no idea that they were entitled to the rate mentioned in the lease, or they would have so prayed, instead of praying for "reasonable rents."

Appellants' assignment of error in the circuit court of appeals.

"*First.* The court erred in computing rents at a less sum than that contracted for *by the lease* under which defendant held the lot in controversy.

"*Second.* The court erred in computing rents at a less amount than was shown to be due by the *testimony* in this cause" (Rec., p. 45).

As will be observed neither of these exceptions was presented or urged in the circuit court. A reversal of the circuit court on either of these grounds, would be a reversal upon grounds not presented or urged in that court.

Instruction to the master.

The instruction given to the master, as to the statement of the account for rents, is as follows:

"And W. S. McCain, special master herein, is now directed to proceed to state an account between said parties *according to the terms of the decree*," etc. (Rec., p. 17).

It will be observed that by the terms of the reference, the master was directed to state the account "*ac-*

cording to the terms of the decree," and that the first assignment of error is, that the court erred in computing rents, not in accordance with the terms of the decree, but at "*a less sum than that contracted for by the lease.*"

The first assignment of error cannot be considered, because it was not submitted to, or passed upon, by the court below.

If the master, in ascertaining the rental value, adopted a rule at variance with the direction of the decree, or at variance with the law of the case, which was prejudicial to the appellants, it became the appellants' duty to point out to the court below an error of that kind.

The master's report advised them that he allowed 50 cents per foot front per month as the rental value of the lots. It advised them that he had not allowed the rental value found in the lease. If they intended to insist upon the terms of the lease and that it furnished the true measure of accounting, that contention ought to have been made in the court below. It was not made there, and was, for the first time, urged in the circuit court of appeals.

An examination of the exceptions urged before the master, will be found on page 43 of the record; and show that the matter contained in the first assignment of error was not presented to or passed upon by the court below.

In Wood *v.* Weimar, 104 U. S., 795, in speaking of this matter, the court said:

"The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

Springer *v.* United States, 102 U. S , 593.

Argument of error in this court.

The cause is now here upon appeal from the Circuit Court of Appeals of the Eighth Circuit, and upon a different assignment of errors than was presented in the circuit court and different from those presented in the court of appeals.

The assignment now is as follows:

"1. This court erred in holding that the allowance to plaintiffs for rents of the land in controversy made in the decree of the court of first instance was sufficient in law and equity.

"2. The court erred in holding that the rents of said land should not be computed in accordance with the terms of the lease granted by Wm. H. Gaines under which the defendant hold, as shown by the pleadings and evidence in this cause."

The court of appeals held (1) that under the decree of this court directing the ascertainment of the rental value of the lots, the master was not bound to accept or take as his guide the rate fixed in the lease; and (2) that the testimony was conflicting as to the rental value, and that in such case the court would accept the finding of the master (Rec., pp. 53, 54, 55.)

The Rector-Gibbon Case.

In the Rector-Gibbon case (111 U. S., 281), there was a lease, which provided that the annual rent should be $500 per annum and $1,500 additional for water privileges; there was a provision that Rector should, at the end of the term, pay two-thirds of the cost of the building and should take the furniture in the same at its actual value, and if he (Rector) should not pay these amounts at the end of the term, the lease should be extended, on the same conditions, until he should make the payments.

The interlocutory decree, so far as is necessary to an understanding of this case, is as follows:

"And it is further ordered that this cause be referred to N. W. Cox, special master of this court, who is directed to ascertain and report to the next term of this court: *First*—The value of the rents of said lots since the date of the award made by said commissioners" (Rec. in Hot Springs cases, p. 441).

In response to that direction the special master found and reported as follows:

"*First.* That the rents of the lots in controversy to be $5 per lineal foot front per annum; that the frontage is 368 feet; that the time is six years four months and ten days, making $12,340" (see Printed Record in Rector-Gibbon case, p. 447).

To this finding the *defendants* excepted, upon the ground that the amount found ($5 per foot front) "is based on a calculation which ignores totally Rector's lease, *which places the rent at $500 per annum*" (Rector-Gibbon Record, p. 549).

Upon the hearing of this and other exceptions, the circuit court decreed as follows:

"It is ordered, adjudged and decreed that all of the exceptions of said defendants to said report be and the same are overruled, *except the first* thereof, which is sustained to the extent of fixing the rental value of the premises mentioned in the first finding of the master at $9,541.66 instead of $12,340" (Rector-Gibbon Rec., 567).

The reduction thus made was $2,798.34.

The case was appealed, and the question of rents in this class of cases came before the supreme court, and in disposing of it that court said:

"The circuit court entered a decree for title—also directed an accounting. That accounting, as finally settled, credited the defendant with the amount of taxes and assessments paid by him—the amount of purchase money paid to the United States for the lots and expenses incurred in obtaining the patent, and the amount due for improvements, on the basis of the lease, and charged him with the money received on certificates from the government for buildings condemned and destroyed, and also the rental value of the premises from the time of the award of the commissioners to the date of the decree.

"We are of opinion that the *rental value* ought not to have been charged; that under the peculiar circumstances of this case, having reference to the doubts that must have arisen as to the matter of title, to the *prima facie* effect of the award given by the commissioners, and to the evident good faith of all the parties in reference thereto, the true measure of liability *is not* THE RENTAL VALUE but *the actual receipts.*"

Lawrence *v.* Rector, 137 U. S., 139.

Thereupon the court restated the account, and finds the "actual receipts" to have been $5,659.07, and enters a decree for that amount of rent.

In doing this the court reduced the decree for rents in the further sum of $3,882.59.

It will be observed in the Rector-Gibbon case the *defendant* was contending that if the relation of landlord continued, that the lease itself established the amount of rent due from one to the other. In this case the *plaintiff* is contending for the same rule, but the court said: "Not so; the true measure of liability is not the *rental value* but the *actual receipts.*"

The master in the Rector-Gibbon case fixed the rents at $5 per foot per annum, which amounted to $12,340. This was at the rate of 41⅔ cents per foot front per month. The court said this was erroneous, and struck off $6,680.93, reducing the $12,340 to $5,659.07, making the amount less than 20 cents per foot front per month. Yet the insatiable maw of the plaintiff is not satisfied with 50 cents per month per foot front.

When the case at bar was before the supreme court, and it confined the time for which rent might be charged, from May 24, 1884, to the rendition of the decree, it had before it the date of the award by the Hot Springs Commissioners, as it had the "actual receipts" in the Lawrence-Rector case. If it was satisfied with the rental value, as found by the master, it was an easy matter to have calculated the rental value and rendered a decree in that court, as it did in the Lawrence-Rector case. Instead of that, it remanded the case. Why was this done? The answer is plain when the facts are known.

Why the rule in the Rector-Gibbon case was not followed in the case at bar.

Counsel for the then appellants, after calling the attention of the court to the Lawrence-Rector case, used this language: "The testimony does not disclose the *actual receipts* as *that phase* of the case was not referred to the master. In point of fact, no rent was received by any of the appellants, from the lots in controversy" (see appellants' brief in Smith *v.* Gaines, p. 83).

It then appears there was no data before that court to fix the rental value upon the basis fixed in the Lawrence-Rector case. What followed next? The court not being content to award from $10 to $12.50 per foot front per annum, remanded the causes, with instructions to ascertain the rental value of the lots, as though no improvements had been placed thereon.

In the light of these facts, let us look at the mandate, which declares:

"And it is further ordered that this cause be, and the same is, hereby remanded to the said circuit court, for further proceedings to be had therein in conformity with the opinion of the court" (Rec., p. 18).

It now becomes important to see what the court said and see what rule it established. It said:

"Under the peculiar circumstances which characterize these cases, we do not feel compelled to award a measure of relief which, in our judgment, would operate harshly and oppressively upon appellants, even though specific prejudice, because of appellee's laches, may not be clearly made out upon these records. In seeking equity appellees must do equity, and as a result has been reached which gives the awards of the commission a direction contrary to that which appellees had accepted as substantially equitable, we think equity requires that they should not be treated as occupying the same position as if they had maintained with vigor and promptness the rights which they found on April 7, 1884, they could assert. * * * We are of the opinion that the accounting between the parties should be stated, both as to debit and credit, from the 23d of May, 1884, with the exception of the credit for the amounts paid to the government for the lots, of which payment we regard the appellees of getting the entire benefit, *and that no increased rent should be allowed on account of the improvements*, as appellees are only to be held to their value as of the date of the decrees. In other words, appellants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest," etc.

Goode *v.* Gaines, 145 U. S., 152.

Why the rental was to be ascertained as though unimproved property.

If you will turn to the testimony of A. B. Gaines, John D. Ware and O. F. Smith, and these are the only witnesses who testified before the first master, on pages 14, 15 and 16 of the printed record, you will see *why* it was the court inserted the words: "And that no increased rent should be allowed *on account of improvements.*"

Gaines says: "*With improvements* $100 per month; without improvements it is worth $15 per foot front per year." Ware says: "$50 per month *with improvements.*" Smith says: "With such a building, $300 per annum."

What the court directed to be found out was, what the rental value of the lots would be *without improvements*. It could not find that out by the testimony *then* in the record. If the court had thought the price stated in the lease was fair and equitable it would have so stated. The fact that it did not so state fills the mind with conviction that it did not intend the adoption of any such rule for determining the rental value. That the plaintiffs did not dream of such an absurdity is evidenced by the prayer of their bill in which they ask, not for rents in conformity *with the lease*, but that "they may be allowed reasonable rents for the occupancy of the said premises.

An erroneous proposition in view of all the facts.

The plaintiff, in black letter, lays down this proposition:

"It having been adjudicated that the defendant was the tenant of the plaintiffs, holding over without warrant of law, and as trustee for the plaintiffs, it follows as a matter of course that the rents accruing during the time of such holding over must be computed according to the terms agreed upon in the lease, unless the landlord shows that on account of special damage they ought to be increased."

And continuing, says: "No exception or qualification has ever been made to this rule, or ever will be, without destroying all of the law on the subject, and destroying all equities that grow out of the relation of landlord and tenant."

The learned counsel is in error in stating that "no exception or qualification has ever been made to this rule," for we have seen that in Goode *v.* Gaines, 145 U. S., 152, and the case now at bar, which was decided at the same time, where the master fixed the rental at $10 per foot per annum, the court struck out the time between the date of the reward and the commencement of the suit; and in the case of Lawrence *v.* Rector, 137 U. S., 139, it would not allow the rate prescribed by the lease, or $5 per front foot per annum, and said that under all the circumstances surrounding the case, the "actual receipts" was all the plaintiff could recover.

The supreme court has modified the general rule as to rents, and if erroneous, this court cannot correct it.

What would have been a proper or equitable rule for computing rent in the ordinary run of cases, where rent has to be ascertained between landlord and tenant, need not be discussed. The court has said the equities of these cases call for the application of another and different rule. The language of the court is:

"While this acquiescence on the appellees' part has not taken away their right of action to recover their property, we think it operates on the right to equitable relief in the matter of permitting a recovery in the way of accounting" (145 U. S., 152).

It may be that the supreme court erred and overthrew all the law on the subject and destroyed all the equities that grow out of the relation of landlord and tenant when it declared that the conduct of the appellant "operates on the right to equitable relief in the matter of permitting a recovery in the way of accounting." If so, the remedy for correcting an error of that kind was by asking for a rehearing in this court, and not by an appeal.

If the court had the power to correct an error of the supreme court, equity demands the power should not be exercised.

Outside and independent of the rule laid down by the supreme court, there is another strong and equitable reason why the appellee should not be subjected to the price fixed by the lease.

The appellants, under the act of June 11, 1870, appeared in the court of claims and pleaded title to the property now in dispute. That court decided adversely to their claim and decreed that the title was in the United States. This decree, on appeal, was affirmed by the supreme court (92 U. S., 698). A receiver was then put in possession of the property by the United States, and all persons residing at Hot Springs were required to attorn to the receiver and pay him rent. This continued from April 24, 1876, until the 3d of March, 1877, at which time Congress passed an act creating a board of commissioners, who were empowered to award the respective holdings to persons who had made improvements thereon. These commissioners were appointed and authorized "to finally determine the right of each claimant or occupant to purchase the lots." One Huff claimed the lot in controversy, by reason of improvements before the commissioners, and they awarded it to him, and he paid the United States therefor. The award was made in October, 1879. On the 14th of March, 1880, at a time when appellants were out of possession, and it had been adjudicated they had no title, Mrs. Granger purchased the lot in controversy of Huff, paying him $2,650 cash, taking a warranty deed. The appellants stood by and did not commence suit until May 24, 1884, and only commenced it then because of the decision in the Rector-Gibbon case (111 U. S., 276).

Mrs. Granger did not go into possession under the appellants, but under title from the United States, who had evicted the plaintiffs. Her vendor had been in possession under the appellants, but he had been turned out and compelled to attorn to the United States, in whom the title had been adjudicated to be. Afterwards, while attorning to the United States, he purchased from the United States and sold to the appellee. How it can be claimed, under such circumstances, she is bound to account for rents, to the appellants, under a lease, which became a nullity between the original parties, is past understanding.

It may be said that when the court decided that the award should have been made to the appellants, that this restored the relation of landlord and tenant. If Jones, in a suit for real property obtains title against Brown, and compels the former tenants of Brown to attorn to him, and afterwards Jones grants the same lands to Brown, will it be contended that this grant establishes the old relation of landlord and tenant between Brown and his former tenants? Jones may convey the land, but he cannot convey the tenants. Tenants are not serfs of the soil.

The burthen of proof as to rental value is on the appellants.

The learned counsel for the plaintiffs say (Brief p. 11): "Leaving out of sight the testimony for the plaintiffs, the defendants only examined two witnesses." The burthen of fixing the rental value is on the plaintiffs. The defendants were under no obligation to furnish any proof upon that point. They had a right to rest upon that furnished by the plaintiffs.

In Mason *v.* Crosby, 3 Woodbury & Minot, 270, the court said:

"It is the business of the plaintiffs, rather than the defendants, to remove doubts and uncertainties, as to the larger amounts claimed—not doing this, and there being evidence to justify either view, the master has allowed the smaller sum."

The exception was overruled and the master sustained.

Hypothetical testimony, not based on existing facts, must be discarded.

There is considerable testimony in the record, as to what the rental value of a lot without improvements would be, for an unbroken period of nine years, where the tenant reserved the right to remove the building, and what the rental value would be for a like period, if the landlord was to pay for the buildings at the end of the term. All this class of testimony is irrelevant; as in both cases it presupposes an unbroken term of nine years, whereas the property was in litigation—already occupied by houses, and the term uncertain. In fixing the value, under such circumstances, the rule would be: "Taking into consideration the fact that the property was in litigation, and the term uncertain, and already occupied by buildings, what would be a fair rental value for the lots, per annum, without improvements?" Hence, testimony based, hypothetically, upon a condition of affairs which did not exist, and could not exist, cannot be considered.

Abstract of testimony pertinent to existing facts.

Now let us look at the plaintiffs' proof of the rental value, which was responsive to the conditions then existing.

Albert B. Gaines, who is one of the plaintiffs:

"Q. What is a reasonable rental value of that lot, (the one in controversy) during that time, with improvements and without improvements?

"A. With improvements, $100 per month; without improvements, it is worth $15 per year per foot front" (Rec., pp. 14 and 15).

This was his testimony before the first master (N. W. Cox) and before the rendition of the final decree which was appealed from. After the cause was reversed on account of excessive rents, and remanded, he came before the second master (W. S. McCain) and again testified as to rental values and said:

"Q. How as to lot 16 in block 68 (the one in controversy)?

"A. I would put that at *ten* dollars per foot front per annum on the theory that you rent from month to month, or from year to year, and put no improvements on it" (Rec., p. 28).

It is hardly necessary to call the attention of the court to the fact that before one master he swears the lot is worth *fifteen* dollars per foot front, per annum, and before another that it is worth *ten*.

John D. Ware, for plaintiffs:

"Q. Can you state what would be the rental value per foot front, as a ground rent, without any improvements upon it in that locality (*i. e.*, of the lot in controversy)?

"A. I think it would be worth 10 per cent upon whatever the land and improvements would bring. By taking off the improvements and calculating 10 per cent upon the value of the land, would be its rental value. I estimate that ground to be worth at present, $200 per foot front; then say $15 per foot front" (Rec., p. 15).

This was his testimony before the first master (N. W. Cox). After the cause went to the supreme court, and was remanded, he again testified before the second master, as to rental values and said:

"Q. How about lot 16, block 68, occupied by Mrs. Granger?

"A. Two hundred and fifty dollars per foot front. It would be worth 6 per cent on that valuation—that is the naked ground without any improvements"(Rec., p. 34).

Before one master he swears the rental value of a naked lot, without any improvements, is an amount equal to *10* per cent on a valuation of $200 per foot front, and before the other that it is 6 per cent upon a valuation of $250 per foot front.

O. F. Smith, for plaintiffs:

"Q. Can you state what would be a reasonable rental value per foot front, for lot 16, block 68, without any improvements upon it?

"A. I should say about $5 per annum per foot front" (Rec., p. 16).

This is *41⅔ cents* per foot front per month, and the master allowed 50 cents per foot front per month.

Ed Hogaboom, for plaintiffs:

"Q. From May, 1884, down to the present time the title to that property was being litigated. State your opinion from this standpoint—if a receiver had been appointed, pending the litigation, which might terminate at any time, and the receiver was authorized by the court to rent the property from year to year, assuming the property to have been naked lots, what rental value could a receiver have obtained for either of the lots in block 130?

"A. I will answer that question that I think my figures were $3 per foot front.

"Q. For one year?

"A. I would put that at *33⅓ cents per foot for one year.* On the question of no certain tenure I state the rent would be nominal" (Rec., p. 25).

"Q. Owing to the fact that the property is in litigation does it or not destroy the rental value, taking into consideration the parties who actually occupy it and the nature of the property?

"A. Yes, it of course must affect the people who are occupying it and it has done so, and must have done so, because they could not put such improvements on it for a permanent tenure, or probably would have done'' (Rec., p. 26).

This witness fixes the rental value at *33⅓ cents* per foot front *per annum*, and the master allowed 50 cents per foot front per month.

J. B. Mellard, for plaintiffs:

"Q. What would be the reasonable rental value of this property, for the time mentioned, if the improvements existing upon them are to be paid for at the present time, but in your estimate no additional rent to be charged on account of improvements—the time from May 22, 1884, up to the present time?

"A. Three, five or six dollars per foot front per annum'' (Rec., p. 29).

The highest price fixed by this witness is 50 cents per foot front per month—his lowest is 25 cents.

Geo. W. Baxter, for plaintiffs:

"Q. The property has been in litigation since 1884—suppose a receiver had been appointed to rent the property from year to year, and assuming the lots to have been vacant, what rental value, in your opinion, ought to have been obtained per foot per annum for that property?

"A. That would be doubtful whether any rent could be obtained for it all, from year to year. It might have been obtained by (from) somebody wanting to put up a tent or telegraph (photograph) gallery.

"Q. The rent would have been merely nominal then?

"A. Yes."

Alf Whittington, for plaintiff:

This witness talks like a garrulous old maid and renders it difficult to summarize what he says, but his opinion is that if an unimproved lot is worth $8,000, the rental value should be worth $800 per annum—that is, 10 per cent on the value.

There are some things that cannot be established by swearing, and one of them is, to convince a court of justice that unimproved lots, the rental tenure of which is from year to year, or from month to month, or the tenure to which will terminate when the suit affecting the property is decided, is worth $10 per front foot per annum, in a little insignificant country town where the support of its inhabitants is derived from a visiting population, which only remains in the locality for three or four months of the year.

D. C. Rugg, for defendant:

"Q. The property of Mrs. Granger is in block 68. State what would have been a fair rental value for that property during the pendency of the litigation, in relation to the title, per annum, from May 23, 1884, down to the present time, not including anything by reason of the improvements upon the property?

"A. The value would be merely nominal.

"Q. What do you mean by nominal?

"A. It would be nothing. That appears to be a singular question (answer), but I will tell you why. It would be nominal for the reason that the property was in litigation and known to be so, and it would have been impossible for any person desiring to rent it to guarantee any specific occupancy of any length of time, by reason of the fact that he could not possibly know at what period of time the litigation would end. It is nominal for this reason, further, there is other property in the town involved in the same litigation, situated practically the same as that is, that has no improvement upon it and has not had for several years, the parties owning it, or thinking they own it, the parties in whose possession it was, have not been able to find a tenant for it on any terms. That is how I base my statement that it would be merely nominal" (Rec., p. 43).

Lucien Farmer, for defendant:

"A. It would be a very small rental. I could not say what it would be worth, probably $1 or $2 per front foot.

"Q. For how long?

"A. For a year.

"Q. Now a lot 25 feet front would not be worth any more than $25 per annum?

"A. No, not over $50 per annum.

This would be *sixteen and two-thirds cents* per foot per month.

The master is sustained by a preponderance of testimony.

The plaintiff put seven witnesses on the stand to prove the rental value. Four out of the seven place the rental value at less than the amount fixed by the master.

Smith—That it is 41⅔ cents per month per foot front.

Hogaboom—That it is 33⅓ cents per month per foot front.

Mellard—That it is from 25, 37½ to 50 cents per month per foot front.

Baxter—That it is nominal.

Two of them swear that a fair rental value would be a certain rate per cent—the one 6 the other 10—on the actual value of the lot. It may be that the members of this court know persons who are deriving a value of from 6 to 10 per cent upon unimproved property, but I know of no rule of law that establishes such a standard for ascertaining rents.

The defendant put two witnesses on the stand to prove rental value.

Rugg says it is merely nominal.

Farmer—That it is 16⅔ cents per foot per month.

There is a conflict in the testimony, and in such case the finding of the master will not be disturbed.

In Tilghman *v.* Proctor, 125 U. S., 149, the supreme court said :

"We are then brought to a consideration of exceptions taken to the master's report, in matters of fact, affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions, the conclusions of the master, depending *on the weighing of conflicting testimony*, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

In Richards *v.* Todd, 127 Mass., 172, the court said: "The report of a master, upon questions of fact referred to him, has substantially the weight of a verdict of a jury, and his findings are not to be set aside or modified *without clear proof of error on his part.*"

In Jafferry *v.* Brown, 29 Fed. Rep., 480, the court say: "The power of the court to set aside the report of a master is undeniable, but it is not to be exercised except for good cause, and mere *differences of opinion* as to *the weight of evidence* where there is a substantial conflict, is not such good cause."

In Welling *v.* La Ban, 34 Fed. Rep., 41, the court say: "The master has decided no question of fact which was not the subject of protracted and vehement contention. * * * Between them the master was compelled to decide. It is wise not to lose sight of the fact that the court is not to determine these facts *de novo*. It is a matter of no moment that a different result might have been reached had the accounting been taken by the court. If the record shows that there was testimony *pro* and *con*, so that intelligent minds might differ upon the question presented, the court will not assume to substitute its judgment for that of the master. His decision upon *disputed facts* should be final. A master stands as the representative of the court. He is selected with special reference to his fitness and experience. In *seeing* and *hearing* the witnesses he possesses advantages in determining questions of fact which a reviewing tribunal *can never have*."

In Donnell *v.* Ins. Co., 2 Sum., 371, Justice Story, in speaking of the rule where there was a conflict in the testimony, said :

"If it be a matter of fair doubt, or a conclusion upon evidence, in its own nature ambiguous and uncertain, upon which different persons equally impartial and intelligent, might entertain different opinions, then the court will not substitute itself for the judgment of the auditors, any more than it would for the judgment of a jury, even though it might not, perhaps, have originally arrived at exactly the same conclusion."

It is respectfully submitted that the doctrine of these cases end the controversy.

JOHN MCCLURE,
For Appellee.